Supreme Court, U.S.
FILED
MAY - 8 2000
OFFICE OF THE CLERK

No. 00-408

IN THE

Supreme Court of the United States

PHILIP CONDON FISHER,

Petitioner,

v.

UNITED FEATURE SYNDICATE INC.
(a Scripps Howard Company), et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

PHILIP CONDON FISHER
1180 South Yerba Santa Drive,
Pueblo West, Colorado 81007-1947
(719) 647—2474

Petitioner/pro se

5 7 P

QUESTIONS PRESENTED.

I. Whether the Court of Appeals erred in sanctioning a lower courts' rejection of petitioner's "one" established copyright claim, of a "last infringing act" and a "continuing wrong" adopted by the Seventh Circuit Court of Appeals; the same crucial issue; and a conflicting decision within the interpretations of 17 U.S.C. § 507(b)?

II. Whether the Court of Appeals erred in sanctioning a lower courts' dismissal of petitioner's copyright case, because they applied "dicta" not binding precedent; and refused to scrutinize his "side—by-side" comparison, to uncover "substantial and striking similarities," in his protected works and the accused works; a common procedure in copyright cases, accepted as relevant evidence in other lower courts?

III. Whether the Court of Appeals erred in sanctioning a lower courts' decision to deny the petitioner due process of law, an evidentiary hearing; and as stated in his Complaint, a " Demand For a Jury Trial and Statutory Damages"; a violation of the Seventh Amendment to the Constitution?

IV. Whether the Court of Appeals erred in sanctioning the lower courts' exclusion of petitioner's direct evidentiary facts (letters from the U. S. Copyright Office) of defendants' illegal publication of false copyright notices; punishable under 17 U.S.C. § 506. Criminal Offenses/18 U.S.C. § 2319?

V. Whether the Court of Appeals erred in sanctioning the lower courts' rejection of petitioners' direct proof of his "purposely misspelled legal words"; errors published in the defendant's 1974 production; the identical misspelled legal words copyrighted and registered in petitioner's original 1971 manuscript; that defendants accessed in 1972 and 1973?

PARTIES

DENVER PUBLISHING COMPANY; E.W. SCRIPPS COMPANY; CHARLES SCHULZ CREATIVE ASSOCIATES; LEE MENDELSON, Producer; BILL MELENDEZ; BARR ARTHUR PRODUCTIONS INC.; WHOLESALE WAREHOUSING OF CANADA; CBS, INC.; NEWS AMERICA PUBLISHING, INC.; KELLOGG COMPANY; METROPOLITAN LIFE INSURANCE COMPANY; CAPITAL CITIES/ ABC, INC.; TCI OF COLORADO; GENERAL ELECTRIC COMPANY; TURNER BROADCASTING SYSTEM INC.; UNIVERSAL PRESS SYNDICATE INC.; SEARS ROEBUCK AND CO.; MONTGOMERY WARD & COMPANY; KACEY FINE FURNITURE; SOUNDTRACK; FINGERHUT CORPORATION; BEST BUY COMPANY; TYSON FOODS INC.; WALT DISNEY COMPANY; ADVANCE PUBLICATIONS INC; S.I HOLDINGS INC.; THOMSON CONSUMER ELECTRONICS; and KARTES VIDEO COMMUNICATIONS; CYCLONE INCORPORATED; KING FEATURES SYNDICATE INC.; and COWLES SYNDICATE INC.; Respondents.

TABLE OF CONTENTS.

Questions Presented i

Parties to the Proceeding iii

Table of Authorities ..... iv, v, vi, vii, viii

Jurisdiction 2

Constitutional and Statutory Provisions Involved ..... 2 thru 5

Statement of the Case 6, 7, 8

Reasons Why the Writ Should be Granted ..... 9 thru 15

Opinions Below 1

Conclusion 16, 17

Appendix ..... follows conclusion

TABLE OF AUTHORITIES.

CASES:

Arnstein v Porter,
(CA2 NY) 154 F2d 464, 68 USPQ 288; and also 154 F.2d 464, 468 (CA2 1946) 4, 11

Baxter v. Curtis Industries, Inc.,
(ND Ohio) 201 F Supp 100, 133 USPQ 78 9

Broadcast Music, Inc. v. Moor—Law, Inc.,
(FDC Del) 203 USPQ 487, 1979—1 CCH Trade
Cases ¶ 62510 13

Bruckman v. Hollzer,
(1946, CA9 Cal) 152, F2d 730, 68 USPQ 252 13

Cass County Music Co. v. C.H.L.R., Inc.,
88 F.3d 635, 641 (CA8 1996) 3

Central Tel Co. v. Johnson Pub. Co.,
(DC Colo) 526 F Supp 838 15

Cholvin v. B. & F. Music Co.
(CA7 Ill) 253 F2d 102, 116 USPQ 491 11

Clarke v. G. A. Kayser ~ Sons, Inc.,
472 F Supp 481, 482 (W.D.Pa. 1979) 12

Costello v. Loew's, Inc.
(DC **Dist Col)** 159 F Supp 782, 116 USPQ 372 13

Detective Comics, Inc., v. Bruns Publications, Inc., et al.
No. 203. Circuit Court of Appeals, Second Circuit;
April 29, 1940. 111 Fed 2d 432, 433, 434, Aff'd.
Superman v Wonderman -- Resolutely Analogous..11

Eckes v. Card Prices Update,
(CA 2 NY) 736 F2d 859, 222 USPQ 762 15

Feltner v. Columbia,
Pictures Television Inc, US SupCt, No. 96-1768,
3/31/98 4

Financial Information, Inc. v. Moody's Investors Service, Inc.
(SD NY) 599 F Supp 994, 223 USPQ 552; and later
proceeding (CA2 NY) 751 F.2d 501, 224 USPQ 632
..... 15

Ford Motor Company;
17 U.S.C. § 106 930 F.2d at 291 12

Foster v. Naftalin,
(State ex rel) 246 Minn. 181, 74 N.W. 2d 249..... 16

Freedman v. Mangalick,
(FDC NJ) 27 FR Serv 2d 220 14

Fyk v. Roth, No. 94-cv-3826, 1995
WL. 321803, at *2 (E.D.Pa. May 25, 1995)..... 12

Gnossos Music v. Mitken Inc.,
653 F.2d 117, 119 (CA4 1981) 3

Jewelers Circular Pub Co. v. Keystone Pub. Co.
(1922, CA 2 NY) 281 F 83, 26 ALR 571. cert. den
259 US 581, 66 L Ed 1074, 42 S Ct 464 15

Lawrence v. Dana,
(CC Mass) F Cas No 8136 15

McMahon vs. Prentice-Hall, Inc.
(ED Mo) 486 F Supp 1296, 6 Media I. R 1465, 205 USPQ 819 16

Morse v. Fields,
(DC NY) 127 F Supp 63, 104 USPQ 54 11

4 M. Nimmer & D. Nimmer, Nimmer on Copyright,
§14.04[C] (1997) 4

4 M. Nimmer & D. Nimmer, Nimmer on Copyright,
§12.10 [B] (1997) 4

Oboler v. Goldin,
714 F.2d 211, 213 (CA2 1983) 4

Sammons v. Larkin,
(1940 DC Mass) 38 F Supp 649, 49 USPQ 350, Mod on other grounds (CAl Mass) 126 F2d 341, 53 USPQ 71 15

See v. Durang,
(CA9 Cal) 711 F2d 141, 219 USPQ 771 11

Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp. (CA9 Cal) 562 F2d 1157, 196 USPQ 97) 11

Sheldon v. Metro-Goldwyn, Pictures Corporation,
2 Cir., 81 F. 2d 49, 53 12

Stratchborneo v. Arc Music Corp.
(SD NY) 357 F Supp 1393, 179 USPQ 403 11

Taylor v. Merrick,
(1983, CA7 I11) 712 F2d 1112, 219 USPQ 420 9

Testa v. Janssen,
(WD Pa) 492 F.Supp 198, 208 USPQ 213 11

Video Views, Inc. v. Studio 21, Ltd.,
925 F. 2d 1010, 1014 CA7 1991 ..... 3, 4

Wheeler v. Wilkin,
98, Colo. 568, 58 F.2d 1223, 1226 16

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS:

Amendments to the United States Constitution.

Copyright, clause; (Art. I, § 8, cl. 8) 2
ARTICLE VII 3

Rule 38 — Federal Rules of Civil Procedure 4, 13

United States Code

17 U.S.C. §104 2
17 U.S.C. §106 12
17 U.S.C. §106(5) 2
17 U.S.C. §504(c) 3, 4
17 U.S.C. § 506(a) and 18 U.S.C. § 2319 ..... 2, 3
17 U.S.C. § 506(c) 3
17 U.S.C. § 507(b) 3

DEFINITION OF RELEVANT EVIDENCE

28 U.S.C. Rule 401 and 402 --APPENDIX--RULES OF EVIDENCE --ARTICLE IV. RELEVANCY AND ITS LIMITS (Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1931.) NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES 5

18 Am Jur 2d § 210 and § 211 — (1985).
COPYRIGHT AND LITERARY PROPERTY LAWS -
Use of; Parallel Column Analysis/Side by Side Comparisons
..... 11

No.

IN THE

Supreme Court of the United States

PHILIP CONDON FISHER,

Petitioner,

v.

UNITED FEATURE SYNDICATE INC.
(a Scripps Howard Company), et, al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

Petitioner Philip C. Fisher respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW.

U.S. Tenth Circuit Court of Appeals, Feb 7, 2000, Case. No. 99—1162 (three judge panel) affirmed the United States District Courts' dismissal. See Appendix; and reported at 37 F. Supp. 2d 1213 (D. Colo. 1999) Fisher v. United Feature Syndicate, Inc.

JURISDICTION.

The judgement of the Court of Appeals was entered on February 7, 2000. This petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. ~ 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The United States Constitution.

Copyright Clause: (Art. I, § 8, cl. 8) provides:

> The Congress Shall have the Power: To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.

17 U.S.C. §104. Subject matter of copyright: National origin. (a) UNPUBLISHED WORKS. — The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

17 U.S.C. § 106(5) Exclusive Rights in copyrighted works, in relevant part, provides:

(5) "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audio—visual work, to display the copyrighted work publicly."

17 U.S.C. § 506(a) Criminal Infringement. Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be

punished as provided in Section 2319 of Title 18.

17 U.S.C. § 506(c) False Copyright notice. Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false, shall be fined not more than $2,500.00.

17 U.S.C. § 507(b) CIVIL ACTIONS. — No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued. (The last infringing act" and a "continuing wrong"); adopted by the Seventh Circuit Court of Appeals.

Amendment to the United States Constitution:

ARTICLE VII.

Right of Trial by Jury.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

All Courts of Appeals have unanimously held that: 17 U.S.C. § 504(c) is not susceptible of an interpretation that would avoid the Seventh Amendment question. See, e.g., Cass County Music Co. v C.H.L.R., Inc., 88 F.3d 635, 641 (CA8 1996); Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1014 (CA7 1991); Gnossos Music v. Mitken Inc., 653 F.2d 117,

119 (CA4 1981); see also Oboler v. Goldin, 714 F.2d 211, 213 (CA2 1983). 4 M. Nimmer & D. Nimmer, Nimmer on Copyright. § 14.04[C] 1997).

Federal Rules of Civil Procedure provides:

FRCP Rule 38 Jury Trial of Right, shall be preserved to the parties inviolate.

The United States LAW WEEK — 66 LW 4245 & 4247, April 7, 1998. SUPREME COURT OPINIONS

The Supreme Court decided:

JURY TRIAL — COPYRIGHTS — Damages

Seventh Amendment provides right to jury trial on all issues pertinent to award of statutory damages under Section 504(c) of Copyright Act, including the amount itself. Feltner v. Columbia Pictures Television Inc, US Sup Ct, No. 96—1768, 3/31/98. Arnstein v. Porter, 154 F.2d 464, 468 (CA2 1946) (copyright action for damages is "triable at 'law' and by a jury as of right"); Video Views, Inc. v. Studio 21, Ltd., 925 F. 2d 1010, 1014 (CA7 1991) ("little question that the right to a jury trial exists in a copyright infringement action when the copyright owner endeavors to prove and recover its actual damages"): 4, M. Nimmer & D. Nimmer, Nimmer on Copyright §12.10[B] (1997) ("beyond dispute that a plaintiff who seeks to recover actual damages is entitled to a jury trial").

DENYING PETITIONERS RELEVANT "SIDE-BY-SIDE" COMPARISON IS IN VIOLATION OF U.S.C. TITLE 28. APPENDIX - RULES OF EVIDENCE - ARTICLE IV. RELEVANCY AND ITS LIMITS - Rule 401 and Rule 402.

DEFINITION OF RELEVANT EVIDENCE.

28 U.S.C. APPENDIX—RULES OF EVIDENCE -
ARTICLE IV.
RELEVANCY AND ITS LIMITS Rule 401 & 402.

Rule 401. Definition of "Relevant Evidence."
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible, Irrelevant Evidence Inadmissible. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

(Pub. L. 93—595, § 1, Jan. 2, 1975, 88 Stat. 1931.) NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES.

The fact to be proved may be ultimate, intermediate or evidentiary; it matters not, so long as it is of consequence in the determination of the action.

All of petitioner's evidence using a "side-by-side" comparison, is "relevant evidence"; and pertains only to accurate similarities, between his accessed 1971 registered manuscript; and the defendant's later in time, 1974 production.

STATEMENT OF THE CASE.

This case involves a massive chain—conspiracy and constructive fraud, to cover-up for the main defendants. Because of these factors, there are many defendants and vicarious infringers. There are numerous erroneous findings and misapplications of law, sanctioned by the Court of Appeals; and they have disregarded normal judicial proceedings. Because of Rule 10, petitioner is not free to address these unscrupulous factors in this petition.

On April 24, 1972, Petitioner Fisher (then an Iowa resident.) personally entrusted his copyrighted and registered 1971 "CHIPPER," 18 Comic Strips and a 2,900 word Manuscript, to James L. Freeman, Managing Editor of (UFS) United Feature Syndicate Inc., New York City.

Around February 9, 1973, $9^{1}/_{2}$ months later, Fisher received a rejection letter from Freeman of United Feature Syndicate, saying "we won't be able to find a spot in our schedule for your "CHIPPER" (a 1971 humanized, cowardly, comic strip Sherlock Dog).

On February 1, 1974, United Feature Syndicate (UFS) released "It's A Mystery, Charlie Brown"; using the same plot, theme, story line, sequence of events and characterization; of Fisher's accessed 1971 "CHIPPER" feature. UFS applied a false 1958 copyright notice on a 1974 Snoopy, portraying a "humanized" Sherlock Dog; published in the Feb 1, 1974 issue of TV Guide.

Fisher compared his 1971 "CHIPPER" Manuscript with the 1974 "It's A Mystery, Charlie Brown" (IAMCB); and by using a "side-by-side" comparison, discovered 527 "substantial and striking similarities"; and in a later (IAMCB) publication, defendants copied his purposely misspelled legal words. Copying of errors coupled with proven access is primary evidence of infringement.

Fisher suspected defendants' were publishing false copyright notices; to pre—date his 1971 "CHIPPER" registrations; so Fisher requested a copyright search in Washington, D. C.; and received letters from the Copyright Office stating there were no separate 1958, 1962, 1986 or 1992 United Feature Syndicate Inc., copyright registrations, for Snoopy as a Sherlock Dog; only a 1974 registration for "It's A Mystery, Charlie Brown."

On August 12, 1996, Fisher filed suit for copyright infringement (within 3 year statute of limitations) in the United States District Court For The District Of Colorado. On June 4, 1997, recused Magistrate Judge Donald E. Abrams, issued his adverse Recommendation; and on June 23, 1997, Fisher filed his Timely Objection, and multitudinous Motions. Judge Walker D. Miller (Case No. 96- WM-1895) handled the case for nearly two years; and then defendants' counsel Baker & Hostetler, hired Judge Walker D. Miller's son as a counsel, creating a conflict of interest; and forcing Judge Miller to recuse himself.

On March 4, 1999 (having Case No. 96—D—1895 for 2

months) Judge Wiley Y. Daniel affirmed and adopted the Magistrate Judge's Recommendations to dismiss Fisher's case, with out an evidentiary hearing or a jury trial.

On April 5, 1999, Fisher filed a Notice of Appeal to the Tenth Circuit Court of Appeals. On August 10, 1999, Fisher filed a perceptive Reply Brief to appellees. On February 7, 2000, the United States Court of Appeals for the Tenth Circuit (Case No. 99—1162) three Judge Panel, Ebel, Kelley and Briscoe Circuit Judges; echoed (D.C. No. 96—D—1895) (D.Colo.) Judge Daniels' affirmation of recused Magistrate Abrams' dubious recommendations; and affirmed dismissal, without any of the Three Judge Panel signing their own Order and Judgement.

REASONS WHY THE WRIT SHOULD BE GRANTED.

This case presents substantial questions regarding an accessed unpublished copyright holders rights, to present his legitimate evidence to a jury, in a manner constitutional in other federal courts. These questions are: the Court of Appeals' rejection of petitioner's "last infringing act/a continuing wrong"; a "side— by—side" comparison of his protected works and the accused works; a "right to a jury trial"; proof of defendants' publication of "false copyright notices"; and the copying of petitioner's "errors," by accessed defendants; all procedures accepted and prosecuted in other lower courts.

I. THE COURT OF APPEALS ERRED IN SANCTIONING A LOWER COURTS' REJECTION OF PETITIONER'S "ONE" ESTABLISHED COPYRIGHT CLAIM, OF A "LAST INFRINGING ACT" AND A "CONTINUING WRONG" ADOPTED BY THE SEVENTH CIRCUIT COURT OF APPEALS.

I. The Tenth Circuit Court of Appeals erred in deciding the statute of limitations had expired on petitioner's 5th Claim of error; and they are in direct conflict with the Seventh Circuit Court of Appeals over interpretations of 17 U.S.C. § 507 (b). Petitioner's approved claim of a "last infringing act" and a "continuing wrong," is an adopted decision entered by the Seventh Circuit Court of Appeals, on the same crucial issue. See Taylor v. Merrick (1983, CA7 I11) 712 F.2d 1112. 219 USPQ 420; and Baxter v. Curtis Industries, Inc., (ND Ohio) 201 F Supp 100, 133 USPQ 78.

Fisher's registered 1975 "LANGSYNE" comic strip vs accessed Universal Press Syndicate's 1993 "FOR BETTER OR FOR WORSE" comic strip (petitioner's 5th Claim of error) is the only claim that is relevant to these Seventh Circuit cases.

II. THE COURT OF APPEALS ERRED IN REJECTING PETITIONERS' LEGITIMATE PRESENTATION OF AN ETHICAL "SIDE-BY-SIDE" COMPARISON; IN FAVOR OF ADOPTING THEIR PARTIAL "ABSTRACTION-FILTRATION-COMPARISON TEST"; THIS PARTIAL PROCEDURE CONFLICTS WITH OTHER COURTS' TOTAL PROCEDURES, FOR DISCOVERING SUBSTANTIAL AND STRIKING SIMILARITIES IN COPYRIGHT CASES.

Petitioner Fisher asserts that the Court of Appeal's three—judge panel decision below, conflicts with decisions by other lower courts; and that they erred in rejecting his "side—by-side" comparison, of his protected components and the accused works, to uncover substantial and striking similarities; an accepted and customary procedure in other United States courts.

The lower courts' decision in favor of a partial "abstraction— filtration—comparison test"; which the Court of Appeals alleges, "filters out the nonprotectable components of the product from the original expression," is a vague procedure, that conflicts with the legitimate review of admissible copyright evidence; a "dicta" procedure that is "particularly unintelligible"; notably an unfair procedure that denies petitioner a

jury trial; and a procedure that a jury would not understand.

Fair "side—by—side" comparisons were applied in the following "stare decisis" copyright cases: Cholvin v B. & F. Music Co. (CA7 I11) 253 F2d 102, 116 USPQ 491; Testa v Janssen (WD Pa) 492 F Supp 198, 208 USPQ 213; Stratchborneo v Arc Music Corp. (SD NY) 357 F Supp 1393, 179 USPQ 403. Arnstein v Porter (CA2 NY) 154 F2d 464, 68 USPQ 288 (disagreed with on other grounds) Sid & Marty Krofft Television Productions, Inc. v McDonald's Corp. (CA9 Cal) 562 F2d 1157, 196 USPQ 97); and as stated in, See v Durang (CA9 Cal) 711 F2d 141, 219 USPQ 771; Morse v Fields (DC NY) 127 F Supp 63, 104 USPQ 54. The Court of Appeals is also in conflict with the COPYRIGHT AND LITERARY PROPERTY LAWS - 18 Am Jur 2d § 210 and § 211 - (1985).

A RESOTUTELY ANALOGOUS SIDE BY SIDE COMPARISON CASE:

Detective Comics, Inc., v. Bruns Publications, Inc., et al. No. 203. Circuit. Court of Appeals-Second Circuit, April 29, 1940. 111 Fed 2d 432, 433, 434, AFFIRMED.

Superman vs. Wonderman. Pursuant to 111 F.2d 432, 433, 434. **2**. Copyrights. "Irrespective of the source from which an author of a work may derive the material which he uses, a picture or writing which is his own production cannot be copied." *ANALOGY:

(1) "Defendants, attempt to avoid the copyright by the "old argument"; that various attributes of "Sherlock Holmes" find prototypes or analogues among the heroes of literature and mythology. But, if the author of "CHIP-

> PER" has portrayed a humanized, talking, cowardly, Sherlock Holmes, Comic Strip Dog (Excerpt) but embodied an arrangement of incidents and literary expressions original with the author, they were the proper subjects of copyright and susceptible of infringement." Sheldon v Metro-Goldwyn Pictures Corporation, 2 Cir., 81 F.2d 49, 53.

Recent cases involving "side—by—side" comparison/parallel column analysis, approved in other District Courts, can be found in: Clarke v. G. A. Kayser & Sons, Inc., 472 F Supp 481, 482 (W.D.Pa. 1979); and Fyk v. Roth, No. 94—cv—3826, 1995 WL. 321803, at *2 (E.D.Pa. May 25, 1995).

Because uncovering "substantial and striking similarities" is determined through a two—prong test (both prongs of which must be met). The first prong is the "extrinsic test," "sufficient similarity"; and the second prong is the "intrinsic (inherent) test"; when copying is demonstrated by someone who has access to a copyrighted work, uses material substantially similar to the copyrighted work, in a manner which interferes with a right protected by 17 U.S.C. § 106." Ford Motor Company, 930 F.2d at 291. After both prongs have been met, they require scrutiny of the items by a "side—by—side" comparison. Consequently, the Court of Appeals' rejection of petitioner's "side-by-side" comparison test, in favor of their lone "abstraction—filtration—comparison test"; does not meet these copyright rules.

III. RIGHT TO A JURY TRIAL.

THE COURT OF APPEALS ERRED IN SANCTIONING A LOWER COURTS' DECISION, TO DENY THE PETITIONER DUE PROCESS OF LAW, AN EVIDENTIARY HEARING; AND AS STATED IN HIS COMPLAINT, A "DEMAND FOR A JURY TRIAL AND STATUTORY DAMAGES"; A VIOLATION OF THE SEVENTH AMENDMENT TO THE CONSTITUTION.

Petitioner/Fisher is a valid U.S.C. Title 17 registered copyright owner; and has exclusive rights under his copyrights. Fisher has a right to a trial by jury under the Seventh Amendment of the Constitution of the United States; and denying Fisher due process of law, is unconstitutional. The petitioner demanded a jury trial in his copyright Complaint.

The Seventh Amendment right to a jury trial, as preserved by Rule 38 of the Federal Rules of Civil Procedure, applies in copyright infringement actions. Similarity, access, and actionable copying are issues of fact for the jury in copyright infringement actions; in cases such as, Costello v. Loew's, Inc. (DC **Dist Col)** 159 F Supp 782, 116 USPQ 372; Bruckman v. Hollzer (1946, CA9 Cal) 152, F2d 730, 68 USPQ 252, Damages & Jury Trial; and parties also have a right to a jury trial on the issue of damages in an action seeking actual damages in the amount of profits derived by the defendants on account of its alleged infringement; in cases such as Broadcast Music, Inc. v Moor—Law, Inc. (FDC Del) 203 USPQ 487, 1979—1 CCH

Trade Cases ¶ 62510; Freedman v. Mangalick (FDC NJ) 27 FR Serv 2d 220. Accordingly, the issue of whether the petitioner's protected works and the accused works are "substantially similar" should be determined by an unbias jury.

IV. FALSE COPYRIGHT NOTICES.

THE COURT OF APPEALS ERRED IN SANCTIONING THE LOWER COURTS' EXCLUSION, OF PETITIONER'S DIRECT EVIDENTIARY FACTS (LETTERS FROM THE U. S. COPYRIGHT OFFICE) OF DEFENDANTS' ILLEGAL PUBLICATION, OF FALSE COPYRIGHT NOTICES; PUNISHABLE UNDER 17 U.S.C. § 506. CRIMINAL OFFENSES/18 U.S.C. § 2319.

The Tenth Circuit Court of Appeals erred in not prosecuting the defendants for their repeated publication of false copyright notices. These false notices were intended to imply the defendants had prior copyright protection to the petitioners. The petitioner presented into evidence many valid letters from the Copyright Office, Library of Congress, Washington, D.C., proving defendants published false copyright notices. This factor is a serious violation of U.S.C. Title 17, § 506 **Criminal offenses (a)** CRIMINAL INFRINGEMENT; and (c) FRAUDULENT COPYRIGHT NOTICE; U.S.C. Title 18 § 2319.

V. DEFENDANTS COPYING OF PETITIONER'S PURPOSELY MISSPELLED WORDS.

THE COURT OF APPEALS ERRED IN SANCTIONING THE LOWER COURTS' REJECTION OF PETITIONERS' DIRECT PROOF OF HIS "PUR-

POSELY MISSPELLED LEGAL WORDS"; ERRORS PUBLISHED IN THE DEFENDANT'S 1974 PRODUCTION; THE IDENTICAL MISSPELLED LEGAL WORDS, COPYRIGHTED AND REGISTERED IN PETITIONER'S ORIGINAL 1971 MANUSCRIPT; THAT DEFENDANTS ACCESSED IN 1972 AND 1973.

The Court of Appeals erred in rejecting the petitioner's direct proof of (accessed defendants) copying his purposely misspelled "legal" words in 1974; errors found only in the petitioner's original 1971 manuscript. Copying of errors is prima facie evidence of infringement; and accepted in the following cases:

Sammons v Larkin (1940 DC Mass) 38 F Supp 649, 49 USPQ 350, Mod on other grounds (CAl Mass) 126 F2d 341, 53 USPQ 71. Central Tel Co. v. Johnson Pub. Co., (DC Colo) 526 F Supp 838. Eckes v. Card Prices Update (CA 2 NY) 736 F2d 859, 222 USPQ 762. Financial Information, Inc. v Moody's Investors Service, Inc. (SD NY) 599 F Supp 994, 223 USPQ 552; and later proceeding (CA2 NY) 751 F2d 501, 224 USPQ 632. Jewelers Circular Pub Co. v. Keystone Pub. Co. (1922, CA 2 NY) 281 F 83, 26 ALR 571. cert. den 259 US 581, 66 L Ed 1074, 42 S Ct 464. Lawrence v. Dana (CC Mass) F Cas No 8136.

CONCLUSION

Petitioner Fisher implores that certiorari be granted in this case, because this court needs to preserve the constitutionality of the copyright laws; and clarify conflicts among appeals courts concerning an ethical procedure to uncover substantial and striking similarities. Fisher's utilization of a relevant and factual "side—by—side" comparison, could be fairly understood by an ordinary juror. Copyright issues have been said not to be too complex for decision by a jury and it would appear that most plaintiff's lawyers now ask for juries and that most copyright cases are now heard by juries. See; McMahon vs. Prentice—Hall, Inc. (ED Mo) 486 F Supp 1296, 6 Media I. R 1465, 205 USPQ 819.

The main question in this case, is whether a jury after viewing 527 substantial and striking similarities; and copying of petitioner's errors; and defendant's false copyright notices; would after viewing Fisher's "side-by-side" comparison, find that the 1974 accessed defendants did in fact infringe and plagiarize Fisher's 1971 prior registered exclusive copyrights?

The importance of this petition to the public cannot be overemphasized, because their will be other cartoonists trying to obtain (pro se) justice, through a legitimate "side—by—side" comparison of their accessed, registered features; and will find it impossible to obtain justice, because some circuit courts will apply their own "dicta," that is not binding in all courts; and in later cases as legal precedent. (State ex rel.) Foster v. Naftalin, 246 Minn. 181, 74 N.W. 2d 249. Wheeler v. Wilkin, 98. **Colo.** 568, 58 F.2d 1223, 1226.

To what extent did the constitution intend to allow "wide departures" (by lower courts) within the meaning and regulation of copyright protection; and how far must a copyright holder proceed in the courts to attain justice?

Respectfully submitted,

PHILIP CONDON FISHER, APS, IPA, IBA, ABI
Petitioner/pro se
1180 South Yerba Santa Drive,
Pueblo West, CO 81007-1947
(719) 647-2474

TABLE OF CONTENTS

APPENDIX A

Opinion of the United States District Court for The District of Colorado, dated March 4, 1999 1-15

APPENDIX B

Opinion of the United States Court of Appeals, Tenth Circuit, dated February 7, 2000 1-12

APPENDIX C

As Ordered by Magistrate Abrams; Proof of Service on February 25, 1997, of all of petitioner's "Exhibits," to Baker & Hostetler; the Document Depository for all Defendants; per "Manual for Complex Litigation Third"; 21.444; "Document Depositories; Page 77. 1-2

APPENDIX

PHILIP CONDON FISHER,
Plaintiff—Appellant,

v.

UNITED FEATURE SYNDICATE INC., et al.,
Defendants-Appellees.

No. 99—1162.

United States Court of Appeals,
Tenth Circuit

February 7, 2000.

On March 3, 1999, pro se Plaintiff's copyright case was dismissed in the United States District Court for the District of Colorado, Case No. 96—D—1895; Judge Wiley *Y.* Daniel, U.S. District Court Judge; affirming the recused Magistrate Judge's recommendation; and district court's order. See, Fisher v. United Feature Syndicate, Inc., 37 F. Supp. 2d 1213 (D. Colo. 1999). Plaintiff appealed. The U. S. Tenth Circuit Court of Appeals, Case. No. 99-1162; three judge panel, Ebel, Kelly, and Briscoe, Circuit Judges; affirmed (without signing their own Order and Judgement) United States District Courts' dismissal, without an evidentiary hearing; and without reviewing Fisher's "side-by-side" evidence. http://caselaw. findlaw.com/cgi-bin/get case. p1?court= 1OTH&navby=case&no=991162

APPENDIX A

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
MAR 04 1999
JAMES R. MANSPEAKER
CLERK

In the United States District Court
For the District of Colorado
Judge Wiley Y. Daniel

Civil Action No. 96-D-1895
PHILIP CONDON FISHER,
Plaintiff,

v.

UNITED FEATURE SYNDICATE, INC. (a Scripps Howard Company), et al.,
Defendants.

ORDER AFFIRMING AND ADOPTING MAGISTRATE JUDGE'S RECOMMENDATION

This matter is before the Court on Plaintiff's pro se copyright infringement complaint pursuant to the Federal Copyright Act, 17 U.S.C. § 101 et seq. The matter was referred to Magistrate Judge Donald E. Abram for a Recommendation, which was issued on June 4, 1997 and is incorporated herein by reference. See 28 U.S.C. § 636(b), Fed. R. Civ. P. 72, D.C.COLO.LR. 72.4. In the Recommendation, Magistrate Judge Abram recommends that defendants' motions and respon-

sive pleadings be granted to the extent that they seek dismissal of Plaintiff's claims, and that the case be dismissed. Recommendation, at 22-26. On June 23, 1997, Plaintiff filed a timely Objection, which necessitates a de novo determination as to those specified proposed findings or recommendations to which objection is made since the nature of the matter is dispositive. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1).

I. Standard of Review

I first address Plaintiff's objections regarding the magistrate Judge's application of the correct standard of review for the Plaintiff's various claims and motions. Plaintiff initially challenges the Magistrate Judge's application of the standard of review for motions to dismiss. Objection, at 2-3. In ruling on a motion to dismiss, I "'must accept all the well pleading allegations as true and must construe them in the light most favorable to the plaintiff.'" David v. County and City of Denver, 101 F.3d 1344, 1352 (10th Cir. 1996) (quoting Gagan v. Norton, 35 F.3d 1473, 1474 n.1 (10th Cir. 1994)). " A complaint may be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) only 'if the plaintiff can prove no set of facts to support a claim for relief.'" Id. (quoting Jojola v. Chavez, 54 F.3d 488, 490 (10th cir. 1995)). Plaintiff claims that the Magistrate Judge did not construe all factual allegations in his favor. Objection, at 2. Yet Plaintiff provides no evidentiary support for this claim other than conclusory statements. After reviewing the Recommendation and the record in this case, I conclude that the Magistrate Judge properly applied the correct standard of review.

Plaintiff also requests that this court grant his motions for summary judgement. Objection at 3. Summary judgement

is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 55(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The moving party bears the initial burden of proof showing that there is an absence of any issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 37, 323 (1986). In copyright cases, only after the moving party has properly supported his summary judgment motion will the burden shift to the non-moving party to rebut with significant evidence. See McRae v. Smith, 968 F. Supp. 559, 561 (D. Colo. 1997). After reviewing the record in its entirety and for the reasons discussed below, I conclude that the plaintiff's summary judgment motion is without merit and must be denied.

II. Discussion

Plaintiff's objections focus on Magistrate Judge Abram's dismissal of his claims as a pro se litigant. Since Magistrate Judge Abram based his findings on both procedural and substantive grounds, I will similarly address Plaintiff's objections to the Recommendation first as to procedure and then as to substance.

A. Rule 8

Plaintiff argues that Magistrate Abram failed to apply the correct standard of review for a pro se litigant's pleadings. Objection, at 2. Plaintiff claims that the Magistrate Judge's negative characterizations of his Complaint do not comport with the liberal construction rule that applies to pro se litigants. Id. at 2. Plaintiff further argues that the Complaint is brief as long

as the supplements are excluded. Id. at 4.

Pleadings should contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P 8(a)(2). Failure to comply with Rule 8(a)(2) may result in dismissal. See Carpenter v. Williams, 86 F.3d 1015, 1016 (10th Cir. 1996). Courts, however, should liberally construe pleadings prepared by a pro se litigant. Haines v. Kerner, 404 U.S. 519, 520 (1972); Gagan v. Norton, 35 F.3d 1473, 1474 n.1 (10th Cir. 1994), cert. denied, 115 S. Ct. 1175 (1995). Nevertheless, the Court cannot "assume the role of advocate for the pro se litigant." Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). With the supplements, I find hat the Plaintiff's Amended Complaint is approximately 140 pages long and contains 43 often repetitive, rambling paragraphs and conclusory allegations. Although Plaintiff is a pro se litigant, I am unwilling to liberally construe Plaintiff's pleadings to the point of excluding Rule 8's clear mandate. After reviewing the Complaint, I concur with the Magistrate Judge's findings that the plaintiff has failed to comply with the requirements of Rule 8(a)(2).

B. Statute of Limitations:

In challenging the Magistrate Judge's recommendation regarding the statute of limitations, Plaintiff first claims that the Defendant's misleading conduct of repeated infringement violations delayed Plaintiff from filing suit before the statute of limitations expired. Objection, at 4. A cause of action for copyright infringement under section 507(b) of the Copyright Act accrues "when one has knowledge of a violation or is chargeable with such knowledge." Roley v. New World Pic-

tures, Ltd., 19 F.3d 479, 481 (9th Cir. 1994). Plaintiff's relies on Hearld Music Co. v. Living Music, Inc., 205 U.S.P.Q. 1241 (S.D.N.Y. 1978), to support his claim that the Defendants' conduct should estop them from raising the statute of limitations defense. Objection, at 4. Plaintiff's reliance on Hearld Music is misplaced. In Hearld Music, the court held that the defendants were estopped from asserting the statute of limitations defense because they had misled the plaintiff into believing litigation was unnecessary, resulting in expiration of statute of limitations. Hearld Music, 205 U.S.P.Q. at 1243. In contrast, Plaintiff here argues that it was the inundation of the alleged violations that delayed him. Objection, at 4-5. Plaintiff provides no explanation or evidence, other than conclusory statements, as to how Defendant's allegedly repeated violations misled and discouraged him from asserting his rights in court. Therefore, I find Defendants' alleged conduct is not misleading behavior for purposes of estopping the Defendants' from asserting their statute of limitations defense.

Plaintiff also seeks to avoid the statute of limitations deficiencies by alleging a "continuing wrong" exception as adopted by the Seventh Circuit in Taylor v. Meirick, 712 F.2d 1112 (7th Cir. 1983). Section 507(b) of the Copyright Act states that "[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." 17 U.S.C. § 507(b). Plaintiff's proposed exception would allow him to recover damages for all infringements more than three years in the past as long s the infringement is continuing and the last infringement occurred within three years prior to initiating suit. Taylor, 712 F.2d at 1118-19. Several Circuits, however have held that section 507(b) bars recovery of damages on any claim accruing more than three

years prior to filing suit. Roley v. New World Pictures, Ltd., 19 F.3d 479,481 (9th Cir. 1994); Stone v. Williams, 970 F.2d 1043, 1049-50 (2d Cir. 1992), cert. denied, 508 U.S. 906 (1993); Hoste v. Radio Corp. of America, 654 F2d. 11, 11-12 (6th Cir. 1981); see also Mai Basic Four, Inc., v. Basis, Inc., 962 F.2d 978, 987 n.9 (10th Cir. 1992) (recognizing a division among the Circuits over interpretations of section 507(b)). I am persuaded by this latter view and decline to apply Plaintiff's proffered exception here.

Plaintiff also argues that the Defendant's fraudulent concealment of their copyrights justify equitable tolling of the statute of limitations. Objection, at 6. To establish fraudulent concealment as a basis for tolling the statute of limitations under Colorado law, Plaintiff must show (1) that Defendants "in equity and good conscience" should have disclosed their copyright notices; (2) that Defendants knowingly and intentionally concealed; (3) that Plaintiff was deceived; and (4) that Plaintiff suffered damages as a result. Smith v. Boyett, 908 P.2d 508, 512 (Colo. 1995). Throughout his Objection, Plaintiff makes broad, conclusory statements which do not address the individual elements of his fraudulent concealment claims. I therefore conclude that these claims have no merit. Having reviewed the Amended Complaint, the Recommendation, and Plaintiff's Objection, I affirm the Magistrate Judge's findings on the statute of limitations issue.

C. Standing

Plaintiff next seeks to introduce new evidence to avoid Magistrate Judge Abram's recommendation that Plaintiff lacks standing to assert causes of action which accrued between September 12, 1993 and September 1996. Objection, at 7-8. Dur-

ing this time Plaintiff was not the legal owner of the copyrights at issue because he has assigned these exclusive rights to a corporation in 1988, 1990, and 1991. Recommendation, at 6-7. The corporation subsequently transferred those rights back to him in September 1996. Id. at 6. Section 501(b) of the Copyright Act states that "[t]he legal or beneficial owner of an exclusive right under a copyright is entitled to institute an action for any infringement of that particular right committed while he or she is the owner." 17 U.S.C. § 501(b). "[A] copyright owner can assign its copyright but, if the accrued causes of action are not expressly included in the assignment, the assignee will not be able to prosecute them." ABKO Music, Inc. v. Harrisongs Music, Ltd., 944 F.2d 971, 980 (2d Cir. 1991). Magistrate Judge Abram found that the minutes of the September 25, 1996 meeting, at which the corporation ratified the sale and transfer to Plaintiff of the copyrights at issue, failed to include any express accrued causes of action. Recommendation, at 6-7. He therefore recommended dismissal of all infringement claims which has accrued during the corporation's ownership of the copyrights. Id. at 7.

On June 23, 1997, Plaintiff filed with the Court amended minutes of the September 25, 1996 meeting, which assign the necessary accrued causes of action to Plaintiff. Objection, at 7-8. A district judge must make a de novo determination of the Magistrate Judge's Recommendation based on the record. Fed. R. Civ. P. 72(b). "[A] district judge may accept, reject, or modify the recommended decision, [or] receive further evidence." Id. I conclude that the copyrights at issue were transferred to the Plaintiff in September 1996 for the purpose of enabling him to prosecute this case with respect to all accrued causes of action. See Motion to Amend Complaint. Therefore, bearing in mind

that Plaintiff is pro se, I will allow Plaintiff's submitted minutes which cure the procedural deficiency on this point. Although I conclude that the accrued causes of action are properly before this Court, they nonetheless fail on their substantive merits for the reasons discussed below.

III. Copyright Infringement

Notwithstanding the procedural defects of the Plaintiff's claims, I have examined the Plaintiff's specific objections to the Magistrate Judge's Recommendation with regard to the substantive merits of the copyright infringement claims. In order for a plaintiff to prevail on a claim for copyright infringement, "Plaintiff must establish both: (1) that it possesses a valid copyright and (2) that Defendants 'copied' protectable elements of the copyrighted work." Country Kids 'N City Slicks, Inc., v Sheen, 77 F.3d 1280, 1284 (10th Cir. 1996). In addition to direct evidence of copying, "Plaintiff can indirectly prove copying by establishing that Defendants had access to the copyrighted work and that there are probative similarities between the copyrighted material and the allegedly copied material." Id; Autoskill, Inc., v. National Educ. Support Sys., 994 F.2d 1476, 1489 (10th Cir. 1993). Liability for copyright infringement will only attach where the Plaintiff can prove that the protected elements of the copyrighted material were copied. Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823, 833 (10th Cir. 1993). Copyright law protects only the expression of an idea, not the idea itself. Autoskill, 994 F.2d at 1491. The copyright Act states that copyright protection does not extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. 102(b) (1996).

To prove substantial similarity between the copyrighted work and the alleged infringing work, the Tenth Circuit has adopted the "abstraction-filtration-comparison" test. Country Kids, 77 F.3d at 1284. The first step of abstraction requires the Court to separate the unprotectable ideas from the work's original expression. Id. at 1285. Second, the Court filters out all other unprotectable elements from the expression. Id. Finally, the court compares the remaining protected elements to the allegedly infringed original work and determines whether the works are substantially similar. Id. In making this determination, the Court looks to see if the similarities between the works are so similar that an ordinary reasonable person would find that the defendant had unlawfully infringed the plaintiff's original work. Id. at 1288. "The essence of this test is whether the 'ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.'" Id. (quoting Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 489 (2d Cir. 1960)).

A Court may find non-infringement as a matter of law where the similarity between the works concerns only non-copyrightable elements of the plaintiff's work or no reasonable jury could find the two works to be substantially similar. Warner Bros. Inc. v. American Broadcasting Companies, 720 F.2d 231, 240 (2d Cir. 1983).

A. Chipper Sherlock Dog vs. Snoopy Sherlock Dog

Plaintiff first objects to the Magistrate Judge's finding that as a matter of law no reasonable jury would find Plaintiff's "Chipper" cartoon to be substantially similar to the Snoopy

character, as portrayed in "It's a Mystery, Charlie Brown" and the Metropolitan Life commercials. In his Amended Complaint, Plaintiff argued that the portrayal of Snoopy as a cowardly detective dog infringed Plaintiff's prior original copyrighted work, "Chipper." In his Recommendation, the Magistrate Judge found that Plaintiff relied primarily on his allegations that both Snoopy and Chipper were cowardly detective dogs to establish his copyright infringement claim. Recommendation, at 12. The Magistrate Judge held for Defendants as a matter of law upon finding that Plaintiff had failed to establish any other similarities between the two characters other than they were both dog detectives. Id.

In his Objection, Plaintiff adds little to his original arguments on this issue. In addition to arguing that the concept of a cowardly detective dog is protected expression, Plaintiff argues that the allegedly copied misspellings, "Baratry" and "Repleven," plus the Snoopy sherlock dog's cowardly behavior in specific sequences, serve as proof of infringement. Objection, at 13-14. I disagree. "in determining whether a character in a second work infringes a cartoon character, courts have generally considered not only the visual resemblance but also the totality of the character's attributes and traits." Warner Bros. v. American Broadcasting Co.s, Inc., 720 F.2d 231, 241 (2d cir.n 1983). After reviewing the record I conclude that the totality of the alleged similar traits and attributes, viewed in the light most favorable to the Plaintiff, fails to satisfy the ordinary observer test.

Furthermore, Plaintiff has failed to indicate how his allegations would satisfy the abstraction-filtration-comparison test under the ordinary observer standard. Plaintiff asks this Court

to adopt a "Parallel Column Analysis" approach which would show similarities side-by-side and argues that similarities viewed in this light support his case. Objection, at 15-16 (citing Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); Greenbie v. Noble, 151 F. Supp. 45 (D.C.N.Y. 1957)). I disagree. Plaintiff's explanations of his evidence under this approach still fails to address or satisfy the reasonable observer standard. I therefore affirm the Magistrate Judge's Recommendation as to this issue.

B. "Chipper" the Cartoon Dog vs. "Chipper" the Puppy

Plaintiff next objects to the Magistrate Judge's finding as a matter of law for Defendant RCA on his twentieth claim that Defendant RCA infringed the name and label of Plaintiff's copyrighted comic strip, "Chipper," in its promotional materials. The Magistrate Judge first determined that Plaintiff had not alleged or established Defendants' access to Plaintiff's work. Recommendation, at 14. Unless Plaintiff can provide direct evidence of copying, he must establish both access and substantial similarity. Country Kids, 77 F.3d at 1284. Plaintiff may meet his initial burden of establishing access by showing that defendant had a reasonable opportunity to view or copy the allegedly infringed work. Autoskill, 94 F.2d at 1490. In his Objection, Plaintiff argues that his third claim in the Amended Complaint and exhibit #10 establish access to Defendant RCA. Objection, at 17-18. The Amended Complaint, however, contains only allegations of access to Defendant Random House. Complaint, at 27-29. Plaintiff's subsequent allegations in his Objection that RCA owned Random House are not contained in the Amended Complaint. Instead, Plaintiff seeks to amend his Amended Complaint through his Objection. Furthermore,

after reviewing the Amended Complaint and exhibits, I find that Plaintiff has provided no other charges or evidence suggesting access to RCA. I will not allow Plaintiff to amend his Amended Complaint based on his Objection.

Plaintiff's argument for substantial similarity also fails. In general, copyright protection does not extend to "[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; [and] mere variation of typographic orientation, lettering, or coloring." 37 C.F.R. 202.1; see, e.g., Arvelo v. American Int'l Ins. Co., 875 F. Supp. 95, 100-1 (D.P.R.), aff'd, 66 F.3d 306 (1st Cir. 1995) (holding that two words in copyrighted advertising campaign did not receive full protection, were not a substantial portion of the advertising campaign, and could not be protected once removed from the advertising campaign's context.) Plaintiff alleges that RCA used the "Chipper" name and label with a similar "concave outer border design" in a caption. Objection, at 18. Plaintiff, however, provides no other allegations or evidence of additional copyright or trademark protection other than the original copyright protecting the "Chipper" comic strip as a whole. I therefore conclude that Plaintiff has failed to state a claim for copyright infringement of the "Chipper" name and label.

C. "Chicken Chipper" vs. "Chick'n Chipper"

Plaintiff also objects to the Magistrate Judge's recommended dismissal of his twentieth claim, alleging that the "Chick'n Chippers" name for Defendant Tyson Foods' chicken products infringed the phrase "Chicken Chipper," which Plaintiff uses in his comic strip. Objection, at 18-20. The Magistrate Judge found that Plaintiff had not alleged access as to this

claim and Plaintiff failed to respond to this deficiency in his Objection. Recommendation, at 15; Objection, at 18-20. Furthermore, as noted above, words and phrases are not entitled to copyright protection. 37 C.F.R. § 202.1; see Arvelo, 875 F. Supp. at 100-1. Plaintiff provides no other evidence other than his own conclusory statement that the close similarities between the two phrases is sufficient evidence of infringement. After reviewing the record in this case, I find that Plaintiff has not stated a claim for copyright infringement on this issue.

D. "Chipper" vs. Peanuts and Other Comic Strips

In his remaining objections regarding the "Chipper" comic strip, Plaintiff argues with general conclusory statements that defendants have infringed his "attitude," "meaning," "style of expression," "sequence of events," "character's dispositions," and "reactions," which he alleges are, in fact, the expression of his ideas. Objection, at 20-35. For the reasons discussed above and after reviewing the Amended Complaint and exhibits, I find Plaintiff's specific objections to be without merit. I concur with the Magistrate Judge's opinion that Plaintiff fails to understand the fundamental differences between idea and expression. Plaintiff would ask this Court to grant him a monopoly on unprotected elements, such as themes, emotions, and attitudes on which comic strips commonly rely. This I decline to do.

In addition, Plaintiff has simply failed to argue that any of his allegations would lead an ordinary observer after applying the abstraction-filtration-comparison test that substantial similarities exist between Plaintiff's original work and the Defendants alleged infringing works. Plaintiff instead insists his

own Parallel Column Analysis satisfies his burden. See, e.g., Objection, at 22, 28 (urging the Court to consider his Parallel Column Analysis). Moreover, even after reviewing the Plaintiff's arguments and comparisons, I cannot conclude that a reasonable observer would view the similarities as substantial. "[S]imilarity of idea or function must be distinguished from similarity of artistic expression." Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 913 (2d. Cir. 1980). "[W]here the protected work and the accused work express the same idea, the similarity that inevitably stems solely from the commonality of the subject matter is not proof of copying." Id. As Plaintiff's arguments and exhibits illustrate, comic strips commonly rely on similar themes, "meanings," and attitudes. Nevertheless, taken together, I find that the similarities are not of expression, but of ideas and require that the Magistrates Judge's recommendation be affirmed with regard to these claims.

E. "Langsyne" Comic Strip vs. "For Better or Worse" Comic Strip

Plaintiff again objects to the Magistrate Judge's finding that the alleged similarities between scenarios in his "Langsyne" comic strip and a "For Better Or Worse" comic strip are only of ideas. Plaintiff states that the "For Better or Worse" comic strip infringed his "Langsyne" expression, which he states is as follows: "Your friends may think your sister or brother is very attractive, but your closer family relationship develops opposite feelings." Objection, at 36. Plaintiff's alleged expression is an idea not protected under the copyright Act. I therefore affirm the Magistrate Judge with respect to his claim.

I have reviewed all of Plaintiff's remaining objections

in his original Objection and find them without merit.

For the reasons stated above, the Court concludes that the Magistrate Judge's Recommendation should be affirmed and adopted. Accordingly, it is

ORDERED that the June 4, 1997 Recommendation of Magistrate Judge Abram is AFFIRMED. It is

FURTHER ORDERED that Defendants' Motions to Dismiss are GRANTED in accordance with the Recommendation. It is

FURTHER ORDERED that all remaining outstanding motions filed in this case are DENIED as moot. It is

FURTHER ORDERED that this case is dismissed with prejudice, each party to pay their own costs and attorneys fees.

DATED THIS 3 day of March, 1999.

BY THE COURT

s/Wiley Y. Daniel
WILEY Y. DANIEL
U.S. District Court Judge

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit
FEB 7 2000
PATRICK FISHER, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PHILIP CONDON FISHER, Plaintiff-Appellant, v. UNITED FEATURE SYNDICATE, INC., a Scripps Howard company; DENVER PUBLISHING COMPANY; E.W. SCRIPPS COMPANY; CHARLES SCHULZ; LEE MENDELSON, Producer; BILL MELENDEZ; BARR ARTHUR PRODUCTIONS, INC.; WHOLESALE WAREHOUSING OF CANADA; CBS, INC.; NEWS AMERICA PUBLISHING, INC., KELLOGG COMPANY; METROPOLITAN LIFE INSURANCE COMPANY; CAPITAL CITIES/ABC, INC.; TCI OF COLORADO; GENERAL ELECTRIC COMPANY; TURNER BROADCASTING SYSTEM, INC.;	No. 99-1162 (D.C. No. 96-D-1895) (D. Colo.)

UNIVERSAL PRESS SYNDICATE, INC.; SEARS, ROEBUCK AND COMPANY; MONTGOMERY WARD & COMPANY; KACEY FINE FURNITURE; SOUNDTRACK; FINGERHUT CORPORATION; BEST BUY COMPANY; TYSON FOODS, INC.; WALT DISNEY COMPANY; ADVANCE PUBLICATIONS INCORPORATED; S.I. HOLDINGS INC.; THOMSON CONSUMER ELECTRONICS,

Defendants-Appellees,
and

KARTES VIDEO COMMUNICATIONS, CYCLONE INCORPORATED; KING FEATURES SYNDICATE, INC.; COWLES SYNDICATE, INC.,

Defendants.

ORDER AND JUDGMENT

Before EBEL, KELLY, and BRISCOE, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. *34(a)(2);* 10th Cir. R. 34.1(G). Therefore plaintiff's request for oral argument is denied and the case is ordered submitted without oral argument.

---

* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Plaintiff Philip Condon Fisher, appearing pro se, brought this action against defendants, claiming that defendants had infringed copyrights Fisher held in a comic strip character named "Chipper" and a comic strip named "Langsyne." After considering Fisher's many objections, the district court affirmed and adopted the magistrate judge's recommendation that defendants' various motions to dismiss be granted and that Fisher's motions for summary judgment be denied. *See Fisher v. United Feature Syndicate, Inc.*, 37 F. Supp. 2d 1213 (D. Colo. 1999).

Fisher appeals, claiming that the district court erred (1) in dismissing his claims that United Feature Syndicate's 1974 feature "It's A Mystery Charlie Brown," starring "Snoopy" as a Sherlock Holmes-type detective dog infringed his copyrights; (2) in dismissing his claims that Metropolitan Life Insurance Company's television advertisements starring "Snoopy" as a Sherlock Holmes-type detective dog infringed his copyrights; (3) in dismissing his claims against several defendants owned by RCA (the RCA defendants) for copyright infringement; (4)

in dismissing his claims that defendant Tyson Foods infringed his copyright by use of its "CHICK 'N CHIPPERS" label on one of its chicken products; (5) in dismissing his claims that defendant Universal Press Syndicate's "For Better Or For Worse" comic strip plagiarized his copyrighted "Langsyne" comic strip; and (6) in dismissing his claim that United Feature Syndicate infringed his copyright in its comic strip "DRABBLE."[1] We have jurisdiction pursuant to 28 U.S.C. § 1291, and, following a careful review of this case, we affirm.

We review de novo the sufficiency of a complaint to survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim for which relief may be granted. *See Bauchman ex rel. Bauchman v. West High Sch.*, 132 F.3d *542*, 550 (10th Cir. 1997). Accepting any well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff, the district court may appropriately dismiss a complaint only when it appears that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See Yoder v. Honeywell, Inc.*, 104 F.3d 1215, 1224 (10th Cir. 1997). We construe Fisher's pro se pleadings liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

---

[1] Fisher filed a mostly unintelligible 128-page, 300-paragraph, 43-claim complaint against forty-one defendants seeking over $3 billion in damages. Fisher filed two large boxes of exhibits with his complaint which were not served on defendants. In an amended complaint, he incorporated the exhibits by reference, but still failed to serve defendants with the exhibits. Following an unsuccessful appeal of the district court's order requiring service of the exhibits, the court granted the defendants' motions to quash service based on Fisher's failure to serve all de-

fendants with copies of the exhibits. Although it is unclear as to whether Fisher ever properly served defendants with the exhibits, the magistrate judge addressed the merits of Fisher's claims because the defendants addressed the merits in their various motions to dismiss. *See Fisher,* 37 F. Supp. 2d at 1222 and n.2.

1. Copyright Infringement

"In order to prevail on [his] copyright infringement claim. [p]laintiff must establish both: (1) that [he] possesses a valid copyright and (2) that [defendants 'copied' protectable elements of the copyrighted work." *(Country Kids 'N City Slicks, Inc. v. Sheen,* 77 F.3d 1280, 1284 (10th Cir. 1996) (quoting *Feist Pubs., Inc. v. Rural Tel. Serv. Co.,* 499 U.S. 340, 361 (1991)). Initially, our inquiry here focuses on whether, as a factual matter, defendants copied Fisher's comic strip. *See id.* Second, we must determine, as a mixed issue of fact and law, if the copied elements of Fisher's work, if any, were protectable under his copyright. *See id.* The Copyright Act provides that copyright protection does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work." 17 U.S.C. § 102(b). "One of the fundamentals of copyright law is that a copyright does not protect an idea, but only the expression of the idea." *Autoskill Inc. v. National Educ. Support Sys., Inc.,* 994 F.2d 1476. 1491 (10th Cir. 1993). Fisher can prove copying either directly, or indirectly by establishing that defendants "had access to the copyrighted work and that there are probative similarities between the copyrighted material and the allegedly copied material." *Country Kids 'N City Slicks, Inc.,* 77 F.3d at 1284.

In making a determination of whether defendants' work is substantially similar to the protected elements of Fisher's work, this circuit applies an "'abstraction-filtration-comparison"' test, requiring that we (1) "separate the ideas (and basic utilitarian functions), which are not protectable, from the particular expression of the work[;]" (2) "filter out the nonprotectable components of the product from the original expression[;]" and (3) "compare the remaining protected elements to the allegedly copied work to determine if the two works are substantially similar."[2] *Id.* at 1284-85; *see also Gates Rubber Co. v. Banlo Chem. Indus., Ltd.*, 9 F.3d 823, 834-42 (10th Cir. 1993). In determining whether the two works are substantially similar, the court inquires " 'whether the accused work is so similar to the plaintiffs work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiffs protectable [sic] expression by taking material of substance and value."' *Country Kids 'N City Slicks, Inc.*, 77 F.3d at 1288. (quoting *Atari, Inc v North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614 (7th Cir. 1982)).

---

2. We reject, as did the district court, Fisher's urging that we abandon the abstraction-filtration-comparison test in favor of a "parallel column analysis" which purports to show by means of comparison of parts and portions of Fisher's comic strip and defendants various depictions, the similarity between the two.

A. "Snoopy" v. "Chipper"

In his complaint, Fisher alleged that United Feature Syndicate, Inc., Charles Schulz, and various other individuals and entities associated with the "Peanuts" comic strip character, "Snoopy," and the story "It's A Mystery Charlie Brown," infringed his copyrights by depicting "Snoopy" in the role of a detective clad in a Sherlock Holmes hat and cape with a large horn pipe and magnifying glass. Fisher alleged that this depiction infringed his copyrighted comic strip portraying a "cowardly" detective dog named "Chipper." Fisher also claimed that a television commercial for Metropolitan Life Insurance Company using "Snoopy" in his Sherlock Holmes role infringed on his "Chipper" copyrights. Both claims are without merit.

In affirming the magistrate judge's dismissal recommendation on this claim, the district court rejected Fisher's contention that because both "Snoopy" and "Chipper" were portrayed as "cowardly detective dog[s]," the two were "substantially similar." *Fisher,* 37 F. Supp. 2d at 1218. The court concluded that Fisher relied exclusively on the cowardly detective dog similarity and did not satisfy the "abstraction-filtration-comparison" test under the reasonable observer standard. *See id.* at 1219. We agree.

As defendants point out in their brief, "Snoopy" was on the scene in 1950, more than twenty years before Fisher copyrighted his "Chipper" character in 1974. *See* Appellees' Jt. Br. at 12. Defendants also noted that during those twenty years "Snoopy" was depicted in numerous roles, including a 1962 "Peanuts" episode submitted as an exhibit by Fisher depicting "Snoopy" dressed in a Sherlock Holmes hat and pipe. *See id.* at

12 n.5. Defendants also contend that while Fisher portrays "Chipper" as a "humanized" dog, *see id.* at 20, "Snoopy" is, and always has been, depicted as a dog, "Charlie Brown's" pet. *see id.* at 12. Fisher alleges that "Snoopy's" depiction as "cowardly" in "It's A Mystery, Charlie Brown," was a departure from his usual depiction as heroic, and was therefore, evidence of copying. Defendants' respond, and we agree that while the "Snoopy" detective character has been depicted as running away if startled, he has always been depicted as a character with "bravado" and has never been depicted as either particularly heroic or cowardly.

Here, it is undisputed that Fisher holds a valid copyright on his "Chipper" comic strip character. *See Feist Pubs. Inc.*, 499 U.S. at 361. However we agree with the district court that Fisher failed to establish sufficient similarities between his "Chipper" comic strip and the detective dog portrayed by "Snoopy" in "It's A Mystery Charlie Brown" to support his claim that defendants copied his work. *See Gates Rubber Co.*, 9 F.3d at 832. Moreover, even if we were to assume that defendants copied portions of Fisher's work, we cannot conclude that those portions are "protected expression and of such importance to the copied work that the appropriation is actionable." *Id.*

Copyright protection is afforded only to original works *See* 17 U.S.C. *§* 102(a); *Feist Pubs., Inc.*, 499 U.S. at 345 ("To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.") (citation omitted). Under the *"scenes a faire* doctrine." expressive elements of a work

are not entitled to copyright protection if they "are standard stock, or common to a particular topic, or . . . necessarily follow from a common theme or setting." *Gates Rubber Co.,* 9 F.3d **at 838;** *see also Auioskill.* 994 F.2d at 1494. Here the Sherlock Holmes treatment is an expression which is common to the detective idea, and "is lacking in the originality that is the *sne qua non* for copyright protection." *Gates Rubber Co.,* 9 F.3d at 838; *see also Alitel, Inc. v. Iqiel. lnc.,* 124 F.3d 1366, 1374-75 (10th Cir. 1997) (noting that "the Irish cop" in "often-recurring themes of police fiction," are unprotected *scenes a faire)* (quotation omitted).

Likewise, Fisher's claim that the appearance of the misspellings of the legal terms "baratry" (barratry) and "repleven" (replevin), in the "It's a Mystery, Charlie Brown" book is prima facie evidence of infringement fails for the same reason. Fisher contends that these are copies of "clerical and typographical errors proving piracy. Appellant's Br. at 6. If there was no other justification for the errors appearing in the book, they could, as Fisher contends suggest copying. *See Central Tele. Co. of Va. v. Johnson Pub. Co.,* 526 F. Supp. 838. 844 (D. Cob. 1981) (opining that the existence of common errors in two telephone directories was strong evidence of copying). As defendants argue however, these errors appear to be in line with the comic strip characters' proclivity for misuse and mispronunciation of legal terms in the Charlie Brown strip. As such, they could be construed as an integral part of the humor or subject matter, a construction that would not give rise to a suggestion of copying. *See Gates Rubber Co.,* 9 F.3d at 838.

Moreover, even if we were to consider the common errors to be some evidence of copying, this does not relieve Fisher of

his burden of proving more substantial similarities between the works, a burden he did not meet. *See Country Kids 'N City Slicks, Inc.*, 77 F.3d at 1288.

The idea of a detective dog is an element which is not included in copyright protection. *See* 17 U.S.C. § 102(b). Moreover, an expression of that idea in a manner which is as common in the public domain as Sherlock Holmes falls under the *scenes a faire* doctrine, is not entitled to copyright protection and "cannot serve as the basis for ultimate liability for copyright infringement." *Gates Rubber Co.* 9 F.3d at 832 n.7.

This same rationale applies equally to Fisher's contention that defendant Metropolitan Life Insurance Company infringed his copyright when they used "Snoopy" in his role as a detective dog in its television commercials. Therefore, the district court's dismissal of these claims for failure to state a claim upon which relief may be granted was correct.

B. "Chipper" the comic strip v. "Chipper" the puppy

Fisher claimed that newspaper and television advertisements for various RCA defendants featuring a picture of a puppy named "Chipper" infringed on his copyright to the name and label of his comic strip. In rejecting this argument, the district court concluded that Fisher had neither met his "burden of establishing access by showing that defendant had a reasonable opportunity to view or copy the allegedly infringed work," or shown substantial similarity. *Fisher.* 37 F. Supp. 2d at 1219. We agree, and affirm the district court on this claim for the reasons stated in its order. *See id.*

C. "Chicken Chipper" v. "Chick 'n Chipper"

Next, Fisher asserts that the district court erred in dismissing his copyright infringement claim against defendant Tyson Foods. Fisher contends that defendant's use of the phrase "Chick 'N Chippers" on one of is food products is a copy of the phrase "Chicken Chipper" which Fisher used in his copyrighted comic strip. Again the district court found that Fisher failed to allege access, *see Country Kids 'N City Slicks, Inc.*, 77 F.3d at 1284. and failed to address this deficiency in his objections to the magistrate judge's recommendation. Fisher does not provide any more support on appeal. Therefore, we affirm the district court's dismissal of this claim for the reasons stated in its order. *See Fisher.* 37 F. Supp. 2d at 1220.

D. "Langsyne" v. "For Better or For Worse"

In his fifth claim of error, Fisher contends that the district court erred in dismissing his claim against defendant Universal Press Syndicate alleging that defendant's comic strip of November 15, 1992, "For Better or For Worse," infringed Fisher's copyright of his 1975 comic strip "Langsyne." This claim was dismissed by the district court as outside the applicable statute of limitations. *See Fisher,* 37 F. Supp.2d at 1222-23. On appeal, Fisher continues to argue the merits of his claim, while neglecting to address any error in the district court's finding that the claim was barred by the statute of limitations. We, therefore affirm the district court's dismissal of this claim for the reasons stated in its order. *See id.*

E. "Chipper" v. "Drabble"

Finally, Fisher contends that defendant United Feature Syndicate infringed his copyright in its October 10, 1993, comic strip "Drabble." In affirming the magistrate judge's recommendation that this claim be dismissed, the district court agreed that Fisher continues to misunderstand the scope of copyright protection in his allegations that the appearance of similar ideas, words, and phrases in other comic strips proves copyright infringement. The court concluded that none of the alleged offending comic strips could be found to be substantially similar to Fisher's "Chipper" strip. *See id.* at 1220. We agree, and affirm the district court on this claim also.

II. Conclusion

In conclusion, we affirm the district court's dismissal of Fisher's claims for the reasons stated above and for substantially the same reasons stated in the magistrate judge's recommendation and the district court's order. *Fisher,* 37 F. Supp. 2d 1213. Insofar as Fisher attempts to pose new arguments in his reply brief, this court does not consider issues not raised and argued in the opening brief. *See State Farm Fire & Casualty Co. v. Mhoon.* 3 1 F. 3d 979. 984 n.7 (10th Cir. 1994); *Codner v. United States,* 17 F.3d 1331. 1332 n.2 (10th Cir. 1994). Fisher's motion to strike portions of appellees' joint answer brief is DENIED. Defendant Tyson Foods' motion to strike "addendum I" to appellant's reply brief is GRANTED. The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

David M. Ebel
Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 96-WM-1895

PHILIP C. FISHER,
Plaintiff,

vs.

UNITED FEATURE SYNDICATE, INC., et al.,
Defendants.

AFFIDAVIT OF DELIVERY

I, Sam Stephens, the affiant, being duly sworn, say: that I am over the age of eighteen years and am not a party to the within action, and that I have duly delivered two complete sets of exhibits, as listed in the EXHIBITS INDEX attached hereto, together with Certification of Plaintiff's Duplicate Exhibits Served to Baker and Hostetler on February 25, 1997, in the following manner:

By handing and delivering to Todd Lundly personally, Attorney at Law, at the offices of Baker and Hostetler, 303 East Seventeenth Avenue, Suite 1100, City and County of Denver, State of Colorado, on February 25, 1997 at 11:15 A.M.

s/ Sam Stephens
Sam Stephens
Private Process Server

Subscribed and sworn before me on this 25th day of February, 1997. My commission expires on October 25, 1997.

Stamp:
Notary Public
State of Colorado
Ramona K. Petty

s/ Ramona K. Petty
Notary Public
438 Bannock St.
Denver, CO 80204

Supreme Court, U.S.
FILED
MAY - 8 2000
OFFICE OF THE CLERK

No. 00-408

IN THE

Supreme Court of the United States

PHILIP CONDON FISHER,

Petitioner,

v.

UNITED FEATURE SYNDICATE INC.
(a Scripps Howard Company), et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT.

SUPPLEMENTAL APPENDIX

PHILIP CONDON FISHER
1180 South Yerba Santa Drive,
Pueblo West, Colorado 81007-1947
(719) 647—2474

Petitioner/pro se

SUPPLEMENTAL APPENDIX

PHILIP CONDON FISHER,

Plaintiff - pro se,

v.

UNITED FEATURE SYNDICATE INC., et al.,

Defendants.

No. 96-WM-1895

In The United States District Court

For The District Of Colorado

June 4, 1997

Per Mr. Clayton Higgins telephone instructions of the Supreme Court on July 7, 2000; the following Recommendation of recused Magistrate Judge Donald E. Abram, is hereby supplemented to Petitioner Fisher's Appendix.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
JUNE 04, 1997
JAMES R. MANSPEAKER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WM-1895

PHILIP CONDON FISHER,
Plaintiff,

v.

UNITED FEATURE SYNDICATE, INC. (a Scripps Howard Company), THE DENVER PUBLISHING CO., THE E.W. SCRIPPS COMPANY, CHARLES SCHULZ/UNITED FEATURE SYNDICATE, LEE MENDELSON, BILL MELENDEZ, WHOLESALE WAREHOUSING OF CANADA, CYCLONE INCORPORATED, THE VIDEO STATION, MID-AMERICAN INDUSTRIES INC., CBS INC., NEWS AMERICA PUBLISHING INC., KELLOGG COMPANY, IBC HOLDINGS CORPORATION, MCDONALD'S CORPORATION, DAYTON HUDSON CORPORATION, THE WALT DISNEY COMPANY/ABC, ADVANCE PUBLICATIONS INC., SI HOLDINGS INC., METROPOLITAN LIFE INSURANCE CO., CAPITAL CITIES/ABC INC., HALLMARK CARDS, INC., TCI OF COLORADO, GENERAL ELECTRIC COMPANY/RCA/TCE, TURNER BROADCASTING SYSTEM INC., UNIVERSAL PRESS SYNDICATE, INC., KING FEATURES SYNDICATE, INC., COWLES SYNDICATE INC. (Hearst Companies), WASHINGTON POST WRITERS GROUP, SEARS ROEBUCK AND

CO., MONTGOMERY WARD & CO., KACEY FINE FURNITURE, SOUNDTRACK, FINGERHUT CORPORATION, BEST BUY COMPANY, TYSON FOODS, INC., SAFEWAY INC., KING SOOPERS, ALBERTSON'S FOOD & DRUG STORES, and KMART STORES,

Defendants.

RECOMMENDATION OF UNITED STATES

MAGISTRATE JUDGE

Magistrate Judge Abram

This matter comes before the Court regarding multiple motions to dismiss by Defendants, motions for summary judgement by Plaintiff, and motions to strike by several parties. United States Magistrate Judge Donald E. Abram hereby makes the following recommendation.

I. INTRODUCTION

Plaintiff, appearing pro se, has filed a lengthy complaint naming numerous Defendants in this action for copyright infringement. Plaintiff created "Chipper," an unpublished comic strip and manuscript featuring the character Chipper, an "inherent cowardly, Sherlock dog detective." Complaint at ¶ 37. Plaintiff owns copyright on "Chipper" dated 1971, 1988, and 1991. Most of Plaintiff's claims concern the "Chipper" comic strip and manuscript. Plaintiff also owns a copyright for another comic strip, "Langsyne," which is subject of additional claims.

II. STANDARD OF REVIEW

Courts should liberally construe pleading prepared by a pro se litigant. Haines v. Kerner, 404 U.S. 519, 520 (1972); Gagan v. Norton, 35 F.3d 1473, 1474 n.1 (10th Cir. 1994, cert. denied, 115 S.Ct. 1175 (1995). Since this is a pro se complaint, it will be liberally construed in favor of Plaintiff.

A. Motions to Dismiss

For purposes of a motion to dismiss, the court must accept all factual allegations in the complaint as true and resolve all reasonable inferences in favor of the plaintiff. Tri-Crown, Inc. v. American Federal Sav. & Loan Ass'n, 908 F.2d 578, 582 (10th Cir 1990). A case should not be dismissed for failure to state a claim unless the court determines beyond doubt that the plaintiff can prove no set of facts which entitles him to relief. Id.

B. Summary Judgement

Summary judgement is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgement as a matter of law. Fed. R. Civ. P. 56(c); Conway v. Smith, 853 F.2d 789, 792 (10th Cir. 1988). "One of the principal purposes of the summary judgement rule is to isolate and [d]ispose of factually unsupported claims or defenses." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). On a motion for summary judgement, the court views the factual record and any reasonable inferences arising from it in the light most favorable to the nonmoving party. Otteson v. United States, 622 F.2d 516, 519 (10th Cir. 1980). "To avoid summary judgement, the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Summary judgement may be granted if the evidence is merely colorable or is non-

significantly probative." Vitkus v. Beatrice Co., 11 F.3d 1535, 1539 (10th Cir. 1993). If the court concludes that, based on the record as a whole, no "rational trier of fact" could find for the nonnmoving party, summary judgement is appropriate. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

III. DISCUSSION

A. Rule 8

Several Defendants have moved for dismissal of Plaintiff's complaint[1] for failure to comply with Fed. R. Civ. P. 8. The complaint contains 128 numbered pages and several additional unnumbered pages and lists 43 claims for relief. Much of the complaint consists of rambling paragraphs containing irrelevant and conclusory allegations. Rule 8 of the Federal Rules of Civil Procedure requires that pleadings contain "a short and plain statement of claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8 (a) (2). A court may dismiss a complaint which does not comply with Rule 8 (a) (2). Carpenter v. Williams, 86 F. 3d 1015, 1016 (10th Cir. 1996) (dismissal appropriate where pleadings fell well short of requirements of Rule 8 and were incomprehensible). As Plaintiff has filed his complaint pro se, the Court must construe his pleadings liberally; however, it is not "the proper function of the district court to assume the role of advocate for the pro se litigant." Hall v.

[1] Plaintiff's amended complaint was filed November 14, 1996. All references to the "complaint" in this recommendation are references to the amended complaint.

Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). Plaintiff has requested leave to file a second amended complaint. Although he has not provided a copy of the proposed second amended complaint to the Court, he has indicated that the proposed second amended complaint merely deletes references to exhibits which have not been properly served on all Defendants. [2] Plaintiff has not complied with the requirements of Rule 8 because none of his claims makes a "short and plain statement." Because Plaintiff's proposed amendments apparently would not remedy this defect, Plaintiff's complaint is subject to dismissal; however the complaint should be dismissed for additional reasons, discussed below.

B. State of Limitations

Several Defendants argue that many of the Plaintiff's claims are barred by the statute of limitations. The Copyright Act provides that "[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." 17 U.S.C. § 507(b) (1996). A cause of action under this section accrued when one has knowledge of a violation or is chargeable with such knowledge. Roley v. New World Pictures, Ltd., 19 F.3d 479, 481 (9th Cir. 1994). Thus, the statute allows recovery only for those acts occurring

---

[2] On March 26, 1997, the Court entered an order granting multiple motions to quash service of the original complaint based on the failure of Plaintiff to serve all Defendants with copies of the exhibits which are part of the complaint. Although Plaintiff has certified that he served two sets of the exhibits on a law firm representing several of the Defendants, it is not clear whether the majority of the Defendants have been properly served with a complete complaint, including the exhibits. Nevertheless, this recommendation addresses the merits of Plaintiff's claims because the parties address the merits of their motions.

within three years of suit. Stone v. Williams, 970 F.2d 1043, 1049-50 (2d Cir. 1992). Furthermore, § 507(b) "does not provide for a waiver of infringing acts within the limitation period if earlier infringements were discovered and not sued upon, nor does it provide for any reach back if an act of infringement occurs within the statutory period." Roley, 19 F.3d at 481 (quoting Hoey v. Dexel Sys. Corp., 716 F.Supp. 222, 223 (E.D. Va. 1989)).

Plaintiff filed his complaint on August 12, 1996. Therefore, all claims which accrued prior to August 12, 1993 are barred under § 507(b). In particular, claims one, two, twenty-three, twenty-four, twenty-five, twenty-eight, twenty-nine, thirty, thirty-five, thirty-six, thirty-seven, and thirty-eight should be dismissed in their entirety because all allegations in those claims concern acts which occurred prior to August 12, 1993.[3] In addition, claims three through fifteen,[4] twenty-six, twenty-seven, thirty-two, thirty-three, and forty-two should be dismissed to the extent they allege acts which occurred prior to August 12, 1993.

C. Standing

---

[3] In some instances, Plaintiff claims he did not discover the alleged infringement until after August 12, 1993; however, he is charged with knowledge of the alleged infringements on the date they occurred. Plaintiff has demonstrated that he was actively and continuously searching for infringements prior to August, 1993.

[4] Claims three through fifteen concern publication of books, cards, and video and audio tapes which were originally published prior to August 12, 1993; however, Plaintiff alleges these items were being sold by Defendants at the time he filed his complaint.

Several Defendants argue that Plaintiff does not have standing to sue with regard to his claims which accrued after September 12, 1993 because plaintiff was not the owner of the copyrights between 1988 and September, 1996. The Copyright Act provides "[t]he legal or beneficial owner of an exclusive right under a copyright is entitled... to institute an action for any infringement of that particular right committed while he or she is the owner of it." 17 U.S.C. § 501(a) (1996) (emphasis added). Rights under a copyright may be assigned; however, at least one circuit court has held that if "accrued causes of action are not expressly included in the assignment, the assignee will not be able to prosecute them." ABKCO Music, Inc. v. Harrisongs Music, Ltd., 944 F.2d 971, 980 (2d Cir. 1991). Thus, "the assignee is only entitled to bring actions for infringements that were committed while it was the copyright owner[,] and the assignor retains the right to bring actions accruing during its ownership of the right, even if the actions are brought subsequent to the assignment." Id.

In this case, Plaintiff is the author and original owner of the copyright at issue. In 1988, 1990, and 1991, Plaintiff transferred all his rights in his copyrights to Fisher's Master Artists Inc. The original complaint in this action was filed by Fisher's Master Artists Inc. with the current Plaintiff appearing pro se for the corporation. Because the complaint was subject to dismissal due to his attempted pro se representation of the corporation, the current Plaintiff filed his amended complaint on November 14, 1996, replacing Fisher's Master Artists Inc. with himself as the sole Plaintiff. Fisher's Master Artists Inc. transferred its ownership of the copyrights back to Plaintiff in September, 1996.

The minutes of Fisher's Master Artists Inc. meeting at which

the corporation "ratified" the sale and transfer of the "Chipper" and "Langsyne" copyrights does not expressly refer to infringement claims which had accrued at that time. Defendants are therefore correct that Plaintiff was not the owner of the copyrights or the rights to institute actions for the infringement of the copyrights between August 12, 1993 and the filing of this lawsuit. Thus, any actions which are not barred by the statute of limitations are barred because Plaintiff did not own the copyrights at the pertinent times and does not own the rights to prosecute the infringement claims.

D. Copyright Infringement

Notwithstanding the above, the Court has analyzed the merits of each of Plaintiff's claims, particularly to the extent they would not be barred by the statute of limitations if Plaintiff did own the right to prosecute the infringement claims. To prevail on his claims for copyright infringement, Plaintiff must establish that he owns a valid copyright and that Defendants copied the original elements of his copyrighted work. Feist Pubs., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1284 (10th Cir. 1996). Absent direct evidence of copying, Plaintiff can indirectly prove copying by establishing that Defendants had access to the copyrighted work and that probative similarities exist between the copyrighted material and the allegedly copied material. Id. Liability for copyright infringement attaches only where protected elements of a copyrighted work are copied. Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d, 823, 833 (10th Cir. 1993). Thus, "[t]he mere fact that a work is copyrighted does not mean that every element of the work may be protected." Feist, 499 U.S. at 348.

"One of the fundamentals of copyright law is that a copy-

right does not protect an idea, but only the expression of the idea." Autoskill Inc. v. National Educ. Support Sys., 994 F.2d 1476, 1491 (10th Cir 1993). The Copyright Act provides "[i]n no case does copyright protection for an original work or authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (1996). Therefore, to determine claims for copyright infringement, the Tenth Circuit has utilized an "abstraction-filtration-comparison" test. Country Kids, 77 F.3d at 1284. Using this test, the court first must separate the ideas which are not protectable from the particular expression of the work. Id. at 1285. Then, the court must filter out the unprotected components of the product from the original expression. Id. Finally, the court compares the remaining protected elements to the allegedly copied work to determine whether the two works are substantially similar. Id.

To determine substantial similarity, the Tenth Circuit has stated that the "ordinary observer" test is an appropriate method. ID. at 1288. The court must consider "whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated plaintiff's protectable expression by taking material of substance and value." Id. (quoting Atari, Inc. v. North Am. Philips Consumer Elec. Corp., 672 F.2d 607, 614 (7th Cir. 1982)). Stated otherwise, "[t]he essence of this test is whether the 'ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same,'" Id. (quoting Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir 1960)). Although the issue of substantial similarity may be an issue of fact for resolution by a jury, a court may determine non-in-

fringement as a matter of law where (1) the similarity between the two works concerns only non-copyrightable elements of the plaintiff's work or (2) no reasonable jury could find that the two works are substantially similar. Warner Bros. Inc. v. American Broadcasting Companies, 720 F.2d 231, 240 (2d Cir. 1983).

E. Chipper Sherlock Dog vs. Snoopy Sherlock Dog

Many of Plaintiff's claims are based on the allegation that television broadcasts, videotapes, books, and audiotapes based on the Peanuts comic strip story "It's a Mystery, Charlie Brown," allegedly first broadcast in 1974, infringe on Plaintiff's copyright of his "Chipper" comic strip and manuscript. Specifically, claims one through four, six through fifteen, eighteen, nineteen, and twenty-two concern "It's a Mystery, Charlie Brown" or the Peanuts character Snoopy portrayed as "Sherlock" detective character. Multiple Defendants have filed motions to dismiss these claims, and Plaintiff has filed several motions for summary judgement on some of his claims.

Plaintiff's primary basis for his claims is that both the Chipper and Snoopy characters are portrayed as "cowardly" detective dogs. The law is well established, however, that Plaintiff's copyrights on "Chipper" do not extend to the mere idea of a cowardly detective dog. 17 U.S.C. § 102(b); Perma Greetings, Inc v. Russ Berrie & Co., 598 F. Supp. 445, 448 (E.D. Mo. 1984) ("[T]he theme,' the 'plot,' the 'ideas' always may be freely borrowed."); Country Kids, 77 F.3 at 1285 (differentiating between expression and ideas.) Rather, only Plaintiff's expression of the idea is protected. Autoskill, 994 F.2d 1476.

Copyright protection is available for characters portrayed in cartoons. E.g., Warner Bros., 720 F.2d at 240. "In determining whether a character in a second work infringes a cartoon

character, courts have generally considered not only the visual resemblance but also the totality of the characters' attributes and traits." Id. at 241. This has been characterized as the "total concept and feel" of the copyrighted character. Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1167 (9th Cir. 1977).

Plaintiff has not alleged or established that any traits of the characters of Chipper and Snoopy are similar other than their portrayal as cowardly detectives. Additionally, a fair viewing of "It's a Mystery, Charlie Brown" and Snoopy's character traits in the story does not indicate that Snoopy is depicted as cowardly. Rather, Snoopy aggressively searches for clues and confronts the other characters in the comic strip as to the location of Woodstock's stolen nest. Furthermore, consistent with Snoopy's traditional character, he does not speak like a human, while Chipper speaks and has more human-like characteristics.

Similarly, Plaintiff's sixteenth and seventeenth claims for relief allege that a Metropolitan Life Insurance Company commercial starring Snoopy as a "Sherlock Dog" infringes on his "Chipper" copyrights. Defendant Metropolitan Life Insurance Company filed a motion to dismiss. In addition, Plaintiff filed a motion for summary judgement on his sixteenth and seventeenth claims against Metropolitan, United Features Syndicate, Charles M. Schulz, and ABC, and CBS. [5]

---

5 Metropolitan Life Insurance Company's Motion also contained a motion to quash service of process which was granted. The Court's minute order of April 16, 1997 states that the motion for summary judgement against Metropolitan is therefore moot. This recommendation nevertheless addresses Plaintiff's sixteenth and seventeenth claims as they are asserted against Metropolitan, in the event Metropolitan is served with a valid complaint, and other Defendants.

Again, Plaintiff has failed to establish any similarity in the characters besides the fact that they are both dog detectives. In fact, Plaintiff notes several differences in the two characters. Chipper is a "double life detective and lawyer," while Snoopy is a "double life Met Life Insurance agent." Chipper is inherently cowardly, while Snoopy is inherently a hero who is out of character as a "cowardly Sherlock dog."

In comparing the total concept and feel of "Chipper" to "It's a Mystery, Charlie Brown" and the Chipper and Snoopy characters, the ordinary observer would not be disposed to overlook the disparities and regard their aesthetic appeal as the same. No reasonable jury could find that Chipper is substantially similar to Snoopy as portrayed in "It's a Mystery, Charlie Brown" and the Metropolitan Life commercials, and Defendants are entitled to judgement as a matter of law on Plaintiff's claims one through four, six through nineteen, and twenty-two.

F. <u>"Chipper the Cartoon Dog vs. "Chipper" the Puppy</u>

Plaintiff's twentieth claim for relief alleges that advertisements featuring a picture of a puppy with the name "Chipper" infringe on his "Chipper" comic strip copyrights. The advertisements portray the well-known dog associated with RCA and Victor Records, "Nipper," sitting next to a puppy, "Chipper." Plaintiff alleges that a group of the Defendants ("the RCA Defendants") advertised using the "Chipper" puppy in newspapers and on television. Defendants Sears, Roebuck and Co., General Electric Company, Thomson Consumer Electronics, Inc., Montgomery Ward & Co., Jack Barton & Co., Best Buy Company, Fingerhut Corporation, and Ultimate Electronics filed motions to dismiss and/or to strike Plaintiff's amended complaint. Defendants News America Publishing and Turner Broadcasting have joined in the motions to dismiss as to the twenti-

eth claim. In addition, Plaintiff filed motions for summary judgement and to strike Defendants' pleadings on his twentieth claim for relief as to Defendants Sears, Roebuck and Co., General Electric Company, Thomson Consumer Electronics, Inc., Montgomery Ward & Co., Jack Barton & Co., Fingerhut Corporation, and Best Buy Company.

Plaintiff's twentieth claim fails as a matter of law. First, Plaintiff fails to allege or establish access to Plaintiff's work by the Defendants named in this claim for relief. Absent direct evidence of copying, access by Defendants to Plaintiff's work is an element which Plaintiff must establish. Country Kids, 77 F.3d at 1284. Furthermore, the name "Chipper" is not subject to copyright protection. "Words and short phrases such as names, titles, and slogans" are not subject to copyright protection. 37 C.F.R. § 202.1. See also Arvelo v. American Int'l Ins. Co., 875 F. Supp. 95, 100 (D.P.R.), aff'd, 66 F.3d 306 (1st Cir. 1995). Plaintiff's copyright protects his comic strip in its entirety rather than the name "Chipper." See id. at 101 (holding copyright protected advertising campaign in its entirety, rather than two words from the whole document). By obtaining copyrights for his comic strip, Plaintiff has not gained a monopoly on the use of the name "Chipper." Therefore, to establish infringement of his copyrights, Plaintiff would have to show that the RCA puppy "Chipper" is otherwise substantially similar to the Plaintiff's comic strip character "Chipper."

Plaintiff's character Chipper is a cartoon dog with human-like qualities. The character is a pen and ink portrayal of an "inherent cowardly, Sherlock dog detective" who thinks and talks much like a human. The RCA puppy Chipper is a real-life puppy, sometimes portrayed in a photograph and sometimes in a drawing. The puppy does not have human-like char-

acteristics and is not featured acting like a human. The puppy is not part of a cartoon comic strip, but it is featured in advertisements for RCA products. The only similarity between Chipper, the RCA puppy, and Chipper, the comic strip character is the name. Thus, considering the total concept and feel of the characters and having filtered out the unprotected element of the name, no reasonable jury could find that the two works are substantially similar. The RCA Defendants are entitled to judgement as a matter of law on Plaintiff's twentieth claim for relief.

G. "Chicken Chipper" vs. "Chick'n Chipper"

Plaintiff's twenty-first claim alleges that frozen food packages manufactured by Tyson Foods infringed on his "Chipper" copyrights. The Tyson Foods package labels feature "Chick'n Chippers," which are boneless chicken patties covered in potato coating. Plaintiff's comic strip "Chipper uses the phrase "Chicken Chipper" several times in reference to the "cowardly" dog, Chipper. According to Plaintiff, the phrase "Chicken Chipper" is the "very essence" or "core expression" of his "Chipper" creation. Complaint at ¶ 173. Plaintiff alleges that he purchased the "Chick'n Chippers" packages at Safeway, King Soopers, Albertson's and Super K Grocery Stores and that those Defendants are "vicarious infringers" of his copyrights. Complaint at ¶ 173.

Defendants King Soopers, Albertson's, and Tyson Foods each filed motions to dismiss. These motions were joined by Defendants Safeway and Kmart Corporation. Plaintiff then filed a motion for summary judgement against King Soopers and Safeway and an additional motion for summary judgement against King Soopers, Safeway, Albertson's, and Tyson Foods.

Plaintiff's twenty-first claim fails for several reasons. First,

Plaintiff again has not alleged or established access by the Defendants named in this claim to his unpublished copyrighted work. Second, the words "Chicken Chipper" in Plaintiff's comic strip are not protected by Plaintiff's copyright. Plaintiff argues that because the phrase "Chicken Chipper" is nearly identical to the phrase "Chick'n Chippers," substantial similarity is established. This argument, however, ignores established copyright law that words and phrases are not subject to copyright protection. 37 C.F.R. § 202.1; Arvelo, 875 F. Supp. at 100. Thus, Plaintiff's copyright protects his comic strip in its entirety rather than the phrase or name "Chicken Chipper." As discussed in connection with Plaintiff's twentieth claim, Plaintiff's copyrights do not grant him a monopoly on the use of the words "Chicken" or "Chipper" or the phrase "Chicken Chipper."

Having filtered out the unprotected element of Plaintiff's works, Plaintiff's claim fails because Tyson's package is not substantially similar to Plaintiff's work. In fact, the two "works" are not even based on a similar idea. Plaintiff's work describes a dog cartoon character named Chipper as a "chicken" to depict the cowardly nature of the dog. Tyson's package portrays its frozen chicken food product. Comparing the Tyson package to Plaintiff's comic strip, an ordinary, reasonable observer would not conclude that Tyson unlawfully appropriated Plaintiff's protectable expression. Therefore, as a matter of law, Plaintiff's twenty-first claim for relief should be dismissed.

H. "Chipper" vs. Peanuts and Other Comic Strips

Plaintiff also asserts that Peanuts greeting cards and comic strips and numerous other comic strips copied certain words or phrases from his "Chipper" comic strip and manuscript. Claims four, twenty-three through thirty-four, and thirty-six through

forty-three concern "Chipper" as compared to various comic strips. Several Defendants have filed motions to dismiss; Plaintiff has filed motions for summary judgement on some of these claims.

Each of these claims should be dismissed for similar reasons as discussed above. For example, Plaintiff's fifth and thirtieth claims for relief allege that a 1978 Hallmark greeting card and other comic strips infringe on his "Chipper" manuscript. In the greeting card, the Peanuts characters are discussing Charlie Brown dressing up as a ghost for Halloween by using an old sheet with eye holes cut in it. As Charlie Brown walks by in the sheet, appearing as Charlie Brown covered in a sheet rather than a ghost, the character Linus states, "Somehow, something seems to have gotten lost in the translation!" In Plaintiff's "Chipper" manuscript, the characters are discussing the character Chipper's "swill soup." The character Sydney gestures a "thumbs down" sign. Chipper misunderstands an happily ladles more soup into Sydney's bowl. Sydney states, "Somehow, somebody lost something, somewhere, someway in the translation!??" Another comic strip, "Born Loser," uses the phrase "it seems to lose something in the translation" in a different context--a discussion between a husband and wife. Plaintiff also attaches a newspaper article from the Rocky Mountain News in which a headline reads, "French 'Reeds' loses something in translation." Plaintiff's Ex. 45. Besides the use of a phrase regarding losing the meaning in translation, the works are completely different. This is a classic example of various authors using a common idea or theme expressed in a completely different manner from Plaintiff's work. As previously noted, neither short phrases nor ideas are subject to copyright protection. 37 C.F.R. § 202.1; 17 U.S.C. § 102(b); Autoskill, 994 F.2d at 1491. After filtering out the unprotected elements

of Plaintiff's comic strip and manuscript and comparing the works to the alleged infringers, the works are not substantially similar.

The remainder of Plaintiff's claims which allege copying by comic strips fail for the same reasons. Plaintiff's contentions that his ideas and use of certain words or phrases misconstrue the fundamentals of copyright law. This is true for Plaintiff's use of the word "serious" in connection with activities such as painting or sports (twenty-third claim); the use of a reference to rabies or being rabid (twenty-fourth claim); comic strips about fishing and the idea of catching the fish's relatives (twenty-fifth and forty-first claims); the idea of not paying for something until tomorrow (twenty-sixth claim); the idea of a character's enthusiasm for a task being thwarted by elements such as newly seeded grass, rain, or snow (twenty-seventh claim); the idea of mistakenly going to work or school on a Saturday or Sunday (twenty-eighth and twenty-ninth claims); the idea of having good intentions about working and then falling asleep on the job (thirty-first claim); the idea of using a broken umbrella or not opening an umbrella in the rain because the weather forecast did not call for rain (thirty-second claim); the idea of admiring one's self in the mirror (thirty-third and thirty-fourth claims); the idea of chasing something and then changing one's mind and going the opposite direction (thirty-sixth claim); the idea of "holding down a job" by sitting on menus vs. having the "job" of being a paper weight (thirty-seventh claim); the idea of intentionally listening to a record with the sound off vs. enjoying listening to a record that skips (thirty-eighth claim); the idea of a character finding something he believes is old and valuable when the item is actually something else of little value (thirty-ninth claim); the idea of something being up a character's nose (fortieth claim); the idea of

dogs climbing trees (forty-first claim); the idea of swatting flies (forty-second claim); and the use of many other ideas, words, or phrases which Plaintiff used in his comic strips or manuscripts (forty-third claim).

Although the key to the ordinary observer test is substantial similarities, not differences, courts have acknowledged that "a defendant may legitimately avoid infringement by intentionally making sufficient changes in a work which would otherwise be regarded as substantially similar to the plaintiff's." Perma Greetings, 598 F. Supp. at 449-450. See also Warner Bros., 720 F.2d at 241 (noting that numerous differences between works tend to undercut substantial similarity). Furthermore, "where the protected work and accused work express the same idea, similarity that inevitably stems solely from the commonality of the subject matter is not proof of unlawful copying." Durham Indus., Inc. v. Tomy Corp. 630 F.2d 905, 913 (2d Cir. 1980).

A comparison of each of the comic strips in Plaintiff's claims shows that the only elements which are arguably common to the Plaintiff's "Chipper" comic strip and manuscript are ideas, themes, single words, or phrases. These elements are not protected. Country Kids, 77 F.3d at 1285. "The similarity to be assessed must concern the expression of ideas, not the ideas themselves." Warner Bros., 720 F.2d at 239 (emphasis added). Liability for copyright infringement attaches only where protected elements of a copyrighted work are copied. Gates Rubber, 9 F.3d at 833 (emphasis added).

Plaintiff mistakenly asserts that the alleged "core expression" of his work, which is actually his idea for the plot, theme or a phrase in the comic strip, is protected. He has failed to establish any similarity in the expression of his ideas as com-

pared with the alleged infringing works and in some instances, his exhibits even note the different manner in which the ideas are expressed. In each case, the characters are different and not similar to the Plaintiff's "Chipper" characters, the situations in which the ideas, words, or phrases are expressed are different, and the manner in which they are expressed are different. Under the ordinary observer test, an ordinary, reasonable person would not find any of the comic strips referenced in Plaintiff's claims to be substantially similar to Plaintiff's "Chipper." Therefore, Defendants are entitled to judgement as a matter of law on Plaintiff's claims four, twenty-three through thirty-four, and thirty-six through forty-three.

I. "Langsyne" Comic Strip vs. "For Better or Worse" Comic Strip

Plaintiff's thirty-fifth claim for relief alleges that the comic strip "For Better or Worse" infringes on the copyright of his comic strip "Langsyne," dated 1975. Defendant Universal Press Syndicate filed amotion to dismiss this claim, and Plaintiff filed a motion for summary judgement as to this claim.

Plaintiff's "Langsyne" portrays four children in a neighborhood backyard. Two of the boys admire a girl sun bathing on a blanket. Another boy states "She ain't swell at all -- just my sister." In the "For Better or Worse" comic strip, four women appear standing on a sidewalk in a snow storm. Three of the women admire a man passing by in a car who honks his horn. One of the women then states, "That was disgusting. . . . That was my brother." Plaintiff's Ex. 50.

Plaintiff again mistakenly attempts to assert that his ideas are protected by the copyright. Although the ideas or themes of the two comic strips are similar, the expression of the ideas

is not substantially similar. Plaintiff asserts that the comic strips are similar because they are based on the same "core expression" communicated in "direct opposites" (i.e. summer clothes vs. winter clothes, little boys vs. big girls, brother vs. sister, etc.). As such, Plaintiff again attempts to identify his idea as the core of protectable expression in his work. The differences in the expression of the idea or plot of the comic strips, however, are precisely the attributes that make the two works different. In this case, the only similarity in the two works is the underlying plot or theme. Under the ordinary observer test, a reasonable jury could not find the "Langsyne" comic strip substantially similar to the "For Better or Worse" comic strip. Therefore, Defendants are entitled to judgement as a matter of law on Plaintiff's thirty-fifth claim for relief.

IV. CONCLUSION

For the above named reasons, Defendants are entitled to judgement as a matter of law on each of Plaintiff's claims.

THEREFORE, IT IS RECOMMENDED that the following motions be granted to the extent they seek dismissal of Plaintiff's claims, and that the complaint be dismissed in its entirety:

1. Motion to Dismiss the Defendant of King Soopers, filed December 17, 1996;

2. Response of Defendant Safeway Inc. to Plaintiff's Amended Complaint, filed December 20, 1996 (referencing joinder in motion to dismiss filed by Defendant King Soopers);

3. Defendant TCI of Colorado's Motion to Dismiss or for Summary Judgement, filed January 10, 1997;

4. Defendant Metropolitan Life Insurance Co.'s Motion to

Quash Service of Process, or Alternatively, Motion to Dismiss, filed January 10, 1997;

5. Sears, Roebuck and Co.'s Motion to Dismiss and/or Strike Plaintiff's Amended Complaint, filed January 10, 1997;

6. Joint Motion for Dismissal of Plaintiff's Amended Complaint by Defendants General Electric Company, Thomson Consumer Electronics, Inc., Montgomery Ward & Co., Jack Barton & Co. and Best Buy Company, filed January 13, 1997;

7. Defendant Fingerhut Corporation's Motion to Quash Service of Process or, Alternatively, Motion to Dismiss, Filed January 21, 1997;

8. Defendant Albertson's, Inc.'s Motion to Dismiss Plaintiff's Amended Complaint, filed January 21, 1997;

9. Defendant Albertson's Joinder in King Soopers' Motion to Dismiss, filed January 21, 1997;

10. Defendant Tyson Foods's Motion to Dismiss for Failure to State a Claim, filed January 21, 1997;

11. Defendant Universal Press Syndicate, Inc.'s Motion to Dismiss or, in the Alternative, Strike Plaintiff's Complaint, file January 22, 1997;

12. Defendants United Feature Syndicate, Inc., The E.W. Scripps Co., Charles Schulz and Charles M. Schulz Creative Associates, The Denver Publishing Co., United Media & Newspaper Enterprise Association, Inc., News America Publishing Inc., Hallmark Cards, Inc., Bill Melendez Productions, Advance Publications, Inc., Random House, Inc., Scholastic, Inc., SI Holdings, King Features Syndicate, Inc., Cowles Syndicate, Inc., Washington Post, IBC Holdings Corporation, ABC, Inc.,

Kmart Corporation and Universal Press Syndicate, Inc.'s Motion to Dismiss Plaintiff's Amended Complaint and Memorandum in Support, filed March 21, 1997;

13. Defendant Sears' Joinder in RCA Defendants' Motion to Dismiss, filed March 21, 1997; and

14. Defendants CBS, Inc., Turner Broadcasting System, Inc., and The Walt Disney Company's Motion to Dismiss for Failure to State a Claim, filed March 21, 1997.

FURTHER, IT IS RECOMMENDED that the following motions filed by Plaintiff be denied:

1. Motion for Rule 56 Summary Judgement on Proportion of Plaintiff's 21st Claim; Against Co-Defendants King Soopers and Safeway Inc., filed January 8, 1997;

2. Motion for Rule 56 Summary Judgement on Proportion of Plaintiff's Twentieth Claim, Against Sears Roebuck and Company, filed January 29, 1997;

3. Motion for Rule 56 Summary Judgement on Proportion of Plaintiff's 21st Claim; or a Jury Trial Against Co-Defendants King Soopers, Safeway Inc., Albertson's & Tyson Foods, filed February 11, 1997;

4. Motion for a Rule 56 Summary Judgement or a Jury Trial on Plaintiff's 35th Claim Against Accessed Universal Press Syndicate Inc., and Motion to Strike UPS Unresponsive Sham Pleading, filed March 5, 1997;

5. Plaintiff's Response Brief to Defendant Sears, Roebuck and Co. and Motion to Strike Defendants Motion to Dismiss and Strike Defendants Brief as a Sham Pleading, filed March 7, 1997;

6. Motion for a Rule 56 Summary Judgement or a Jury Trial on Proportion of Plaintiff's Twentieth Claim, Against Defendants General Electric Company, Thomson Consumer Electronics, Inc/RCA Montgomery Ward & Co., Jack Barton & Co., Fingerhut Corporation and Best Buy, filed March 10, 1997;

7. Motion for Rule 56 Summary Judgement or a Jury Trial for All Profits on Plaintiff's 16th and 17th Claims; Against Metropolitan Life Insurance Company, Accessed United Features Syndicate, Charles M. Schulz and Vicarious Infringers ABC, CBS, filed March 17, 1997;

8. Motion by Plaintiff Opposing TCIOC (TCI) and Defendants' Opposition to Plaintiff's Amended Complaint (Already Granted) and Motion to Strike TCIOC's Motion for a Summary Judgement and Dismissal; and Strike TCIOC's Answer as a Sham Defense *Plaintiff Also Motions for a Rule 56 Summary Judgement Against TCI on 18th, 19th & 22nd Claims or a Jury Trial on TCI profits by Transmitting "It's a Mystery, Charlie Brown"; by Accessed Disney who Willfully Infringed Plaintiff's Copyrights Four Times, filed March 17, 1997;

9. Plaintiff's Brief Opposing Accessed Defendant Universal Press Syndicate's Motion to Dismiss and Strike Plaintiff's Complaint and Motion to Strike Defendant's Brief as Anther Unresponsive Pleading to Plaintiff's 35th Claim, filed April 10, 1997;

10. Motion for a Rule 56 Summary Judgement or a Jury Trial on Plaintiff's 5th - 6th - 12th - 14th - 18th - 19th - 22nd - 25th - 30th - 32nd - 39th & 41st Claims Against Accessed Defendants, filed April 30, 1997; and

11. Motion for a Rule 56 Summary Judgement or a Jury Trial on Plaintiff's 26th - 27th - 28th - 29th - 31st and 42nd Claims

Against Accessed Defendants, filed June 2, 1997.

FURTHER, IT IS ORDERED that pursuant to Fed. R. Civ. P. 72(b), the parties have ten (10) days after service hereof to serve and file written, specific objections to the findings of fact, conclusions of law, or recommendations of the Magistrate Judge with the District Judge assigned to the case. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file such written specific objections to the findings of fact, conclusions of law and recommendations of the Magistrate Judge as set forth in this document **will bar** the party from a de novo determination by the District Judge. United States v. Raddatz, 447 U.S. 667, 676-83 (1980). Additionally, the failure to file written specific objections to the findings of fact, conclusions of law or recommendations of the United States Magistrate Judge in this document within ten (10) days after being served with a copy **will bar** appellate review of the findings of fact, conclusion of law or recommendations of the Magistrate Judge. Thomas v. Arn, 474 U.S. 140 (1985); Talley v. Hesse, 91 F.3d 1411 (10th Cir. 1996).

Dated at Denver, Colorado, this 4th day of June 1997

By the Court:

s/D.E. Abram

D.E. Abram

United States Magistrate Judge

Supreme Court, U.S.
FILED
OCT 13 2000
CLERK

(3)

No. 00-408

IN THE

Supreme Court of the United States

PHILIP CONDON FISHER,

Petitioner,

v.

UNITED FEATURE SYNDICATE INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

MARC D. FLINK
Counsel of Record
BAKER & HOSTETLER LLP
303 East 17th Avenue
Suite 1100
Denver, Colorado 80203
(303) 861-0600

Attorneys for United Feature Syndicate, Inc., E.W. Scripps Co., Charles M. Schulz Creative Associates, Denver Publishing Co., News America Publishing, Inc., Lee Mendelson, Bill Melendez, Arthur Barr Productions, Inc.; Capital Cities/ABC, Inc., Advance Publications, Inc., SI Holdings, Inc. and Kellogg Company

THOMAS B. KELLEY
FAEGRE & BENSON LLP
370 17th Street, Suite 2500
Denver, Colorado 80202-4004
(303) 592-9000

Attorneys for Walt Disney Co., CBS, Inc. and Turner Broadcasting Company

TODD P. BLAKELY
SHERIDAN ROSS, P.C.
1560 Broadway, Suite 1200
Denver, Colorado 80202-5141
(303) 863-9700

Attorneys for Thomson Consumer Electronics; General Electric Co.; Montgomery Ward & Company; Kacey Fine Furniture; Soundtrack; Fingerhut Corporation; and Best Buy Company

(Additional Counsel for Respondents listed on inside cover)

27pp

CHARLES F. LUCE, JR.
MOYE, GILES, O'KEEFE,
VERMEIRE & GORRELL LLP
29th Floor, 1225 17th Street
Denver, Colorado 80202-5529
(303) 292-2900

Attorneys for Metropolitan Life Insurance Co.

EILEEN R. LERMAN
LERMAN & ASSOCIATES, P.C.
50 South Steele Street, Suite 820
Denver, Colorado 80209
(303) 394-3900

Attorneys for DS-Max International, Inc. f/k/a Wholesale Warehousing International, Inc. f/k/a Murlar Wholesale Warehousing of Canada, Inc.

KENNETH B. SIEGEL
SHERMAN & HOWARD L.L.C.
633 17th Street, Suite 3000
Denver, Colorado 80202
(303) 297-2900

Attorneys for Mountain States Video, Inc. d/b/a TCI of Colorado, Inc.

SUANNE M. DELL
L. MICHAEL BROOKS, JR.
WELLS, ANDERSON & RACE LLC
1700 Broadway, Suite 1020
Denver, Colorado 80290
(303) 830-1212

Attorneys for Sears Roebuck & Company

QUESTIONS PRESENTED

I. Whether the Court of Appeals correctly applied the statute of limitations set forth in 17 U.S.C. § 507(b) relating to Universal Press Syndicate's 1993 comic strip "For Better or For Worse"?

II. Whether the Court of Appeals correctly applied the "abstraction-filtration-comparison" test in determining that there was no substantial similarity between the protectable elements of petitioner's works and the works of the respondents?

III. Whether the Court of Appeals properly dismissed petitioner's meritless claims without providing a jury trial?

IV. Whether petitioner's allegations of false copyright notices had any relevance to his claims?

V. Whether the Court of Appeals correctly concluded that petitioner's allegation of "purposely misspelled legal words" was not sufficient to sustain his copyright infringement claims?

PARTIES TO THE PROCEEDING

The respondents identified as parties in the Petition who join in this response are United Feature Syndicate, Inc.; Denver Publishing Company; E.W. Scripps Company; Charles Schulz Creative Associates; Lee Mendelson, Producer; Bill Melendez; Arthur Barr Productions Inc.; Wholesale Warehousing of Canada; CBS, Inc.; News America Publishing, Inc.; Kellogg Company; Metropolitan Life Insurance Company; Capital Cities/ABC, Inc.; TCI of Colorado, Inc.; General Electric Company; Turner Broadcasting System Inc.; Sears Roebuck and Co.; Montgomery Ward & Company; Kacey Fine Furniture; Soundtrack; Fingerhut Corporation; Best Buy Company; Walt Disney Company; Advance Publications Inc.; SI Holdings Inc.; and Thomson Consumer Electronics.

The respondents identified as parties in the Petition who have waived their response are Universal Press Syndicate, Inc. and Tyson Foods, Inc.

The respondents identified as parties in the Petition who were dismissed from this action before the Tenth Circuit Court of Appeals and were improperly included in the petitioner's list of respondents are King Features Syndicate, Inc., Cowles Syndicate, Inc., Kartes Video Communications and Cyclone Incorporated.

CORPORATE DISCLOSURE STATEMENTS PURSUANT TO SUPREME COURT RULE 29.6

E.W. Scripps Company is a publicly traded company and has no parent or publicly held company owning 10% or more of its stock.

United Feature Syndicate, Inc. is wholly owned by the E.W. Scripps Company, a publicly traded company.

Denver Publishing Company is wholly owned by the E.W. Scripps Company, a publicly traded company.

Capital Cities/ABC, Inc. n/k/a ABC, Inc. is an indirect subsidiary of the Walt Disney Company whose shares are publicly traded. Walt Disney is a publicly traded company and has no parent or publicly held company owning 10% or more of its stock.

Advance Publications, Inc. is privately held company and has no parent or publicly held company owning 10% or more of its stock.

General Electric Co. is a publicly traded corporation and has no parent or publicly held company owning 10% or more of its stock.

Thomson Consumer Electronics, Inc. is wholly owned by Thomson Multimedia S.A., a French company. Thomson Multimedia S.A. is publicly traded through American Depository Receipts. Thomson S.A., a non-publicly traded French company, owns more than 10% of Thomson Multimedia S.A.

RCA, formerly Radio Corporation of America, is no longer a legal entity. RCA brand products are distributed in the United States by Thomson Consumer Electronics, Inc.

Montgomery Ward & Co., Inc. filed for bankruptcy in July 1997. Its assets were ultimately transferred to Montgomery Ward, LLC. Montgomery Ward, LLC is solely owned by subsidiaries of General Electric Co., a publicly traded company.

Soundtrack is a d/b/a of Ultimate Electronics, Inc., which is a publicly traded company. Ultimate Electronics, Inc. has no parent or publicly held company owning 10% or more of its stock.

Kacey Fine Furniture is a d/b/a of Jack Barton & Company, Inc., which is a privately held corporation and has no parent or publicly held company owning 10% or more of its stock.

Fingerhut Corporation is wholly owned by Federated Department Stores, a publicly traded company. Federated Department Stores has no parent or publicly held company owning 10% or more of its stock.

Best Buy Co., Inc. is a publicly traded company and has no parent or publicly held company owning 10% or more of its stock.

Charles M. Schulz Creative Associates is a privately held company and has no parent or publicly held company owning 10% or more of its stock.

News America Publishing, Inc. was merged into News America Incorporated in 1999. News America Incorporated is a wholly owned subsidiary of the News Corporation Limited ("TNCL"), a publicly held corporation organized under the laws of the State of South Australia. TNCL's American Depository Receipts are traded on the New York Stock Exchange.

Arthur Barr Productions, Inc. is a privately held company and has no parent or publicly held company owning 10% of more of its stock.

SI Holdings, Inc. is the successor corporation to Scholastic Corporation. Scholastic Corporation is a publicly traded company and has no parent or publicly held company owning 10% of more of its stock.

Kellogg Company is a publicly traded company and has no parent or publicly held company owning 10% or more of its stock.

Sears Roebuck & Company is a publicly traded company and has no parent or publicly held company owning 10% or more of its stock.

Metropolitan Life Insurance Company is wholly owned by MetLife, Inc., a publicly traded company. MetLife, Inc. has no parent or publicly held company owning 10% or more of its stock.

DS-MAX International, Inc. f/k/a Wholesale Warehousing International, Inc. f/k/a Murlar Wholesale Warehousing of Canada, Inc. ("DS-MAX") is a privately held company. DS-MAX is owned 97.5% by Lawrence Tenebaum

Holdings Limited, a privately held company, with no parent or publicly held company owning 10% or more of its stock, and 2.5% by individuals.

Mountain States Video, Inc. d/b/a TCI of Colorado, Inc. is a wholly owned subsidiary of United Cable Television of Colorado, Inc. United Cable Television of Colorado, Inc. is a wholly owned subsidiary of United Cable Television Corporation. United Cable Television Corporation is a wholly owned subsidiary of United Artists Holdings, Inc. United Artists Holdings, Inc. is a wholly owned subsidiary of AT&T Broadband, LLC, in which AT&T CORP. is the sole member.

CBS, Incorporated is a wholly owned subsidiary of Viacom Incorporated, a publicly traded company.

Turner Broadcasting System, Inc. is a wholly owned subsidiary of Time Warner, Inc., a publicly traded company. Time Warner, Inc. has no parent or publicly held company owning 10% or more of its stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Corporate Disclosure Statements Pursuant to Supreme Court Rule 29.6	iii
Table of Contents	vii
Table of Cited Authorities	ix
Opinions Below	1
Statement of the Case	1
I. Nature of the Case.	1
II. Course of Proceedings.	3
Reasons for Denying the Writ	6
I. Statute of Limitations.	6
II. The Test For Copyright Infringement Was Properly Applied.	7
III. There Is No Right To A Jury Trial On Meritless Claims.	9

Contents

Page

IV. Petitioner's Allegations Of "False Copyright Notices" Are Irrelevant To His Claims For Copyright Infringement. 11

V. The Presence Of Misspelled Words Did Not Give Rise To A Copyright Claim. 11

Conclusion 12

TABLE OF CITED AUTHORITIES

Page

Cases:

Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., 672 F.2d 607 (7th Cir. 1982) 7, 8

Christensen v. Ward, 916 F.2d 1462 (10th Cir.), *cert. denied*, 498 U.S. 999 (1990) 10

Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280 (10th Cir. 1996) 7

Feist Pubs., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) 7

Perma Greetings v. Russ Berne & Co., 598 F. Supp. 445 (E.D. Mo. 1984) 2

Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464 (1962) 9

Statutes:

17 U.S.C. § 111(a) 4

17 U.S.C. § 507(b) i

United States Constitution:

Seventh Amendment 9

Cited Authorities

	Page
Rules:	
Fed. R. Civ. P. 12(b)	10
Fed. R. Civ. P. 12(b)(6)	12
Fed. R. Civ. P. 56	5, 10
10th Cir. R. 36.3	6

Respondents respectfully submit that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit should be denied.

OPINIONS BELOW

Philip Condon Fisher v. United Feature Syndicate, Inc., et al., Case No. 99-1162, United States Court of Appeals for the Tenth Circuit, reported at 2000 U.S. App. LEXIS 1749 (unpublished decision) (Petitioner's Appendix A); *Philip Condon Fisher v. United Feature Syndicate, Inc., et al.*, 37 F. Supp. 2d 1213 (D. Colo. 1999) (Petitioner's Appendix B), with attached Recommendation of United States Magistrate Judge (Petitioner's Supplemental Appendix).

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This is a *pro se* copyright infringement case. Petitioner, Philip Condon Fisher ("Mr. Fisher"), asserts that he owns virtually every idea ever expressed in certain unpublished comic strips created by him, including "Chipper" and "Langsyne," and that the use of similar ideas by other cartoonists in different comic strips constitutes copyright infringement. Mr. Fisher claims that his creation of a humanized "dog" named "Chipper," who Mr. Fisher describes as a cowardly Sherlock Holmes-type detective, legally precluded Charles Schulz from casting his comic character "Snoopy" in the role of a detective in the story "It's A Mystery Charlie Brown." Mr. Fisher claims that his copyrights were infringed when "Snoopy" assumed the role of a detective in 1974. "Snoopy" was created in 1950, over twenty years before "Chipper." A central part of "Snoopy's" established persona is his fantasy life. Long before "Chipper" was even a twinkling in my Fisher's eye, "Snoopy" had already portrayed

dozens of different characters, including a detective in 1962, a decade before "Chipper" was created.

The gross and absurd over breadth of the exclusive rights claimed by Mr. Fisher is perhaps best evidenced by his claims that Tyson Foods infringed his rights by producing a processed chicken food product called "Chick'n Chippers" and that RCA infringed his rights by naming its trademark puppy "Chipper."

As stated by the District Court, Mr. Fisher "would ask this Court to grant him a monopoly on unprotected elements, such as themes, emotions, and attitudes on which comic strips commonly rely." 37 F. Supp. 2d at 1220. The United States Magistrate Judge, the District Court and the Tenth Circuit Court of Appeals correctly determined that Mr. Fisher's claims were without merit. *See* Petitioner's Supplemental Appendix, Petitioner's Appendix A and Petitioner's Appendix B.

> This copyright action, as a whole, has been built up partly upon a wholly erroneous understanding of the extent of copyright protection; and partly upon that obsessive conviction, so frequent among authors and composers, that all similarities between their works and any others which appear later must inevitably be ascribed to plagiarism.

Perma Greetings v. Russ Berne & Co., 598 F. Supp. 445, 450 (E.D. Mo. 1984). This is an apt characterization of this case. *See* 37 F. Supp. 2d at 1220 ("[Mr. Fisher] fails to understand the fundamental differences between idea and expression.").

II. COURSE OF PROCEEDINGS.

On August 12, 1996, Mr. Fisher filed a "mostly unintelligible 128-page, 300-paragraph, 43-claim complaint against forty-one defendants." 2000 U.S. App. LEXIS 1749 at *5 n.1. The complaint sought damages in excess of $3 billion. *Id.* The plaintiff was Fisher Master Artists, Inc., a Colorado corporation ("FMA"). Filed with the complaint were two boxes of exhibits. The exhibits filed with the District Court were incorporated by reference in the complaint. The exhibits were not served on any of the respondents.

On August 15, 1996, Judge Zita L. Weinshienk ordered that the complaint would be dismissed if an attorney failed to enter an appearance on behalf of FMA.

On October 3, 1996, FMA filed a motion to amend the complaint to provide that Mr. Fisher, an individual, would be substituted as plaintiff in place of FMA. On October 28, 1996, the District Court granted the motion to amend.

On November 14, 1996, Mr. Fisher filed an amended complaint. The amended complaint incorporated by reference the exhibits previously filed with the Court. The exhibits were not served with the amended complaint.

On November 14, 1996, Mr. Fisher filed a motion seeking relief from the requirement that he serve on respondents copies of the exhibits filed with the District Court and incorporated by reference in the amended complaint. On December 30, 1996, Mr. Fisher filed further motions seeking relief from the requirement that he serve respondents with both the amended complaint and exhibits. By order dated January 3, 1997, the District Court denied Mr. Fisher's motion for relief from the requirement that he serve copies of the amended complaint with exhibits.

On January 6, 1997, defendant United Feature Syndicate, Inc. and other respondents filed a motion to quash service of process based on Mr. Fisher's failure to serve on respondents copies of the exhibits filed with the District Court and incorporated by reference in the amended complaint. The motion to quash was joined by numerous other respondents who never had been served with the exhibits filed with the District Court and referenced in the amended complaint.

On January 10, 1997, respondent Mountain States Video, Inc. d/b/a TCI of Colorado, Inc. filed a Motion to Dismiss or for Summary Judgment based in part on its status as a "passive carrier" of the allegedly infringing video of "It's a Mystery, Charlie Brown", pursuant to 17 U.S.C. § 111(a).

On January 22, 1997, a hearing was held before Magistrate Judge Abram. Magistrate Judge Abram reiterated and ordered that Mr. Fisher must supply a full set of the exhibits filed with the District Court and referenced in the amended complaint on each respondent by February 7, 1997 or service would be quashed.

On January 29, 1997, Mr. Fisher filed a Notice of Appeal. Mr. Fisher appealed from the District Court's interlocutory orders requiring him to serve on defendants copies of the exhibits filed with the District Court and referenced in the amended complaint. That appeal was dismissed for lack of jurisdiction.

On March 21, 1997, United Feature Syndicate, Inc. and related respondents filed a motion to dismiss Mr. Fisher's amended complaint. Respondent Universal Press Syndicate joined in the motion to dismiss. The motions to dismiss were joined by other defendants, including CBS, Inc., Turner Broadcasting System, and Walt Disney Company.

On March 26, 1997, Magistrate Judge Abram granted all pending motions to quash service of process for Mr. Fisher's failure to serve exhibits referenced in the amended complaint. Magistrate Judge Abram granted Mr. Fisher leave to file a second amended complaint.

At various times and against various defendants, Mr. Fisher filed motions styled as motions for summary judgment pursuant to Fed. R. Civ. P. 56.

On June 4, 1997, Magistrate Judge Donald Abram issued his Recommendation that the Mr. Fisher's amended complaint be dismissed, that the above-referenced motions for dismissal and summary judgment filed by defendants be granted, and that judgment be entered for the respondents. Magistrate Judge Abram's Recommendation is appended to the District Court's decision. 37 F. Supp. 2d at 1221-31.

On June 23, 1997, Mr. Fisher filed objections to the Magistrate's recommendations.

On March 4, 1999, The Honorable Wiley Y. Daniel issued a Final Judgment and Order adopting the Magistrate Judge's Recommendation. 37 F. Supp. 2d 1213. On March 5, 1999 and March 9, 1999, the Order and Judgment was amended in matters not material to this petition.

On April 5, 1999, Mr. Fisher filed a Notice of Appeal to the Tenth Circuit Court of Appeals.

On June 7, 1999, Mr. Fisher filed Appellant's Report Identifying Remaining Defendants/Appellees ("Appellant's Report"). Mr. Fisher stated in the Appellant's Report that "[t]he defendants previously dismissed by the plaintiff and now excluded and dismissed by the plaintiff/appellant, from this

appeal are as follows: (1) King Features Syndicate, Inc./Cowles Syndicate, Inc. . . . (14) Kartes Video Communications . . . (15) Importer, Cyclone, Inc. . . . ."

On February 7, 2000, the Tenth Circuit Court of Appeals affirmed the District Court's decision in an unpublished decision. 2000 U.S. App. LEXIS 1749. Pursuant to 10th Cir. R. 36.3, the unpublished judgment of the Tenth Circuit is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.

REASONS FOR DENYING THE WRIT

This writ should be denied for four principal reasons. First, the reasoning and judgment of the District Court and the Tenth Circuit Court of Appeals are sound and correct. Second, the unpublished decision issued by the Tenth Circuit Court of Appeals does not conflict with the decision of another United States Court of Appeals on the same matter. Third, the lower court's disposition of this *pro se* matter that was presented by "a mostly unintelligible 128-page, 300-paragraph, 43-claim complaint against forty-one defendants seeking over $3 billion in damages", after giving deference to the plaintiff's *pro se* status, was entirely appropriate and does not call for an exercise of this Court's supervisory power. Finally, the petition should not be granted to reevaluate the findings by the lower courts with respect to petitioner's copyright claims.

I. STATUTE OF LIMITATIONS.

This issue relates solely to Mr. Fisher's claim against respondent Universal Press Syndicate, Inc. Universal Press Syndicate, Inc. has waived its right to file a brief in opposition to the petition.

II. THE TEST FOR COPYRIGHT INFRINGEMENT WAS PROPERLY APPLIED.

The Tenth Circuit's decision was firmly grounded on the elements for copyright infringement enunciated by this Court in *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991):

> In order to prevail on [his] copyright infringement claim [p]laintiff must establish both: (1) that [he] possesses a valid copyright and (2) that [defendants] "copied" protectable elements of the copyrighted work.

Id. at 361.

The Tenth Circuit first focused on the allegations relating to whether respondents copied Mr. Fisher's comic strip. The Tenth Circuit next considered whether the alleged copied elements of Mr. Fisher's work, if any, were protectable under his copyright. Following a reasoned *de novo* analysis that need not be reviewed by this Court, the Tenth Circuit decided those issues in favor of the respondents.

The Tenth Circuit applied the "abstraction-filtration-comparison" test in making the determinations that defendants' works are not substantially similar to the protected elements of Mr. Fisher's work. In determining whether two works are substantially similar, the Tenth Circuit inquired "whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiffs' protectable [sic] expression by taking material of substance and value." 2000 U.S. App. LEXIS 1749 at *8, *citing to Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1288 (10th Cir. 1996), *quoting Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614

(7th Cir. 1982). That inquiry led to the conclusion that there was no infringement.

As part of its findings of no substantial similarity between "Snoopy" and "Chipper," the Tenth Circuit found as follows:

> In affirming the magistrate judge's dismissal recommendation on this claim, the district court rejected Fisher's contention that because both "Snoopy" and "Chipper" were portrayed as "cowardly detective dog[s]," the two were "substantially similar." *Fisher*, 37 F.Supp.2d at 1218. The court concluded that Fisher relied exclusively on the cowardly detective dog similarity and did not satisfy the "abstraction-filtration-comparison" test under the reasonable observer standard. *See id.* at 1219. We agree.
>
> As defendants point out in their brief, "Snoopy" was on the scene in 1950, more than twenty years before Fisher copyrighted his "Chipper" character in 1974. *See* Appellees' Jt. Br. at 12. Defendants also noted that during those twenty years "Snoopy" was depicted in numerous roles, including a 1962 "Peanuts" episode submitted as an exhibit by Fisher depicting "Snoopy" dressed in a Sherlock Holmes hat and pipe. *See id.* at 12 n.5. Defendants also contend that while Fisher portrays "Chipper" as a "humanized" dog, *see id.* at 20, "Snoopy" is, and always has been, depicted as a dog, "Charlie Brown's" pet. *See id.* at 12. Fisher alleges that "Snoopy's" depiction as "cowardly" in "It's A Mystery, Charlie Brown," was a departure from his usual depiction as heroic, and was therefore,

> evidence of copying. Defendants' [sic] respond, and we agree that while the "Snoopy" detective character has been depicted as running away if startled, he has always been depicted as a character with "bravado" and has never been depicted as either particularly heroic or cowardly.
>
> * * *
>
> The idea of a detective dog is an element which is not included in copyright protection. *See* 17 U.S.C. §102(b). Moreover, an expression of that idea in a manner which is as common to the public domain as Sherlock Holmes falls under the *scenes a faire* doctrine, is not entitled to copyright protection and "cannot serve as the basis for ultimate liability for copyright infringement." *Gates Rubber Co.* 9 F.3d at 832 n. 7.

2000 U.S. App. LEXIS 1749 at *9-11.

The Tenth Circuit similarly made well reasoned determinations that Mr. Fisher's "Chipper" was not infringed by RCA's puppy "Chipper," Tyson Foods' "Chick'N Chippers" food product and UFS's "Drabble" comic strip. 2000 U.S. App. LEXIS at *14-16.

III. THERE IS NO RIGHT TO A JURY TRIAL ON MERITLESS CLAIMS.

It is well established that there is no Seventh Amendment right to a jury trial where there are no issues of fact to be tried by the jury. *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 467 (1962). Similarly, the right to a jury trial does not exist with respect to a complaint as to which a dismissal or nonsuit is proper.

Here, the Tenth Circuit properly stated and applied the correct standards for determining whether Mr. Fisher's *pro se* complaint sufficiently stated facts to survive a motion to dismiss:

> We review de novo the sufficiency of a complaint to survive a Fed.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim for which relief may be granted. *See Bauchman ex rel. Bauchman v. West High Sch.*, 132 F.3d 542, 550 (10th Cir. 1997). Accepting any well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff, the district court may appropriately dismiss a complaint only when it appears that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See Yoder v. Honeywell, Inc.*, 104 F.3d 1215, 1224 (10th Cir. 1997). We construe Fisher's pro se pleadings liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

2000 U.S. App. LEXIS 1749 at *6.

Under the facts as alleged in the amended complaint and the exhibits incorporated therein, it was clear to the Magistrate Judge, the District Court Judge, and the three judge panel of the Tenth Circuit that Mr. Fisher's "mostly unintelligible" amended complaint failed to state claims for relief upon which relief could be granted. Under such circumstances, where the facts taken as true do not give rise to a claim as a matter of law, there is no right to a jury trial. *See Christensen v. Ward*, 916 F.2d 1462, 1466 (10th Cir.), *cert. denied*, 498 U.S. 999 (1990); *see also* Fed. R. Civ. P. 12(b) and 56.

IV. PETITIONER'S ALLEGATIONS OF "FALSE COPYRIGHT NOTICES" ARE IRRELEVANT TO HIS CLAIMS FOR COPYRIGHT INFRINGEMENT.

This issue, apart from its being without factual or legal support, has no bearing upon whether Mr. Fisher's complaint stated a claim for copyright infringement. Petitioner asserts that "[t]he Tenth Circuit Court of Appeals erred in not prosecuting the defendants for their repeated publication of false copyright notices." Pet. at 14. Having no authority or jurisdiction to "prosecute" any of the respondents, the Tenth Circuit properly disregarded this argument in affirming dismissal of petitioner's copyright claims.

V. THE PRESENCE OF MISSPELLED WORDS DID NOT GIVE RISE TO A COPYRIGHT CLAIM.

The Tenth Circuit considered and properly rejected Mr. Fisher's allegations based on misspelled words:

> Likewise, Fisher's claim that the appearance of the misspellings of the legal terms "baratry" (barratry) and "repleven" (replevin), in the "It's a Mystery, Charlie Brown" book is prima facie evidence of infringement fails for the same reason. Fisher contends that these are copies of "clerical and typographical errors" proving piracy. Appellant's Br. at 6. If there was no other justification for the errors appearing in the book, they could, as Fisher contends suggest copying. *See Central Tele. Co. of Va. v. Johnson Pub. Co.*, 526 F. Supp. 838, 844 (D. Colo. 1981) (opining that the existence of common errors in two telephone directories was strong evidence of copying). As defendants argue, however, these errors appear to be in line with the

> comic strip characters' proclivity for misuse and mispronunciation of legal terms in the Charlie Brown strip. As such, they could be construed as an integral part of the humor or subject matter, a construction that would not give rise to a suggestion of copying. *See Gates Rubber Co.*, 9 F.3d at 838. Moreover, even if we were to consider the common errors to be some evidence of copying, this does not relieve Fisher of his burden of proving more substantial similarities between the works, a burden he did not meet. *See Country Kids 'N City Slicks, Inc.*, 77 F.3d at 1288.

2000 U.S. App. LEXIS 1749 at *12-13.

The Court of Appeals properly dismissed each of Mr. Fisher's claims.

CONCLUSION

This is yet another case where federal courts have gone to extraordinary lengths to give a *pro se* plaintiff who thoroughly misunderstands the law and has an unrealistic view of the "facts" his day in court. Mr. Fisher was given a fair opportunity to convince a Magistrate Judge, a District Court Judge, and the Tenth Circuit Court of Appeals that he had valid claims for copyright infringement. After a careful review of the allegations and legal theories, those tribunals determined that Mr. Fisher's "mostly unintelligible 128-page, 300-paragraph, 43-claim complaint against forty-one defendants" failed to state claims for relief upon which relief could be granted. The claims were properly dismissed pursuant to Fed. R. Civ. P. 12(b)(6). That dismissal properly was affirmed. Mr. Fisher's odyssey through the federal court system should end. Mr. Fisher's petition for writ of certiorari should be denied.

Respectfully submitted,

MARC D. FLINK
Counsel of Record
BAKER & HOSTETLER LLP
303 East 17th Avenue
Suite 1100
Denver, Colorado 80203
(303) 861-0600

Attorneys for United Feature Syndicate, Inc., E.W. Scripps Co., Charles M. Schulz Creative Associates, Denver Publishing Co., News America Publishing, Inc., Lee Mendelson, Bill Melendez, Arthur Barr Productions, Inc.; Capital Cities/ABC, Inc., Advance Publications, Inc., SI Holdings, Inc. and Kellogg Company

THOMAS B. KELLEY
FAEGRE & BENSON LLP
370 17th Street, Suite 2500
Denver, Colorado 80202-4004
(303) 592-9000

Attorneys for Walt Disney Co., CBS, Inc. and Turner Broadcasting Company

TODD P. BLAKELY
SHERIDAN ROSS, P.C.
1560 Broadway, Suite 1200
Denver, Colorado 80202-5141
(303) 863-9700

Attorneys for Thomson Consumer Electronics; General Electric Co.; Montgomery Ward & Company; Kacey Fine Furniture; Soundtrack; Fingerhut Corporation; and Best Buy Company

CHARLES F. LUCE, JR.
MOYE, GILES, O'KEEFE,
VERMEIRE & GORRELL LLP
29th Floor, 1225 17th Street
Denver, Colorado 80202-5529
(303) 292-2900

Attorneys for Metropolitan Life Insurance Co.

EILEEN R. LERMAN
LERMAN & ASSOCIATES, P.C.
50 South Steele Street, Suite 820
Denver, Colorado 80209
(303) 394-3900

Attorneys for DS-Max International, Inc. f/k/a Wholesale Warehousing International, Inc. f/k/a Murlar Wholesale Warehousing of Canada, Inc.

KENNETH B. SIEGEL
SHERMAN & HOWARD L.L.C.
633 17th Street, Suite 3000
Denver, Colorado 80202
(303) 297-2900
Attorneys for Mountain States Video, Inc. d/b/a TCI of Colorado, Inc.

SUANNE M. DELL
L. MICHAEL BROOKS, JR.
WELLS, ANDERSON & RACE LLC
1700 Broadway, Suite 1020
Denver, Colorado 80290
(303) 830-1212
Attorneys for Sears Roebuck & Company

Supreme Court, U.S.
FILED
NOV 2 2000
CLERK

(4)

No. 00-408

In The

Supreme Court of the United States

PHILIP CONDON FISHER,

Petitioner,

v.

UNITED FEATURE SYNDICATE INC.
(a Scripps Howard Company), et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

PHILIP CONDON FISHER
1180 South Yerba Santa Drive,
Pueblo West, Colorado 81007-1947
(719) 647-2474

Petitioner/pro se

1788

REPLY TO QUESTIONS PRESENTED BY RESPONDENTS

I. The Tenth Circuit Court of Appeals is in direct conflict with the Seventh Circuit Court of Appeals, concerning the Statute of Limitations, 17 U.S.C. § 507(b). The "last discovered infringing act" and a "continunig wrong".

II. The Tenth Circuit Court of Appeals Test for copyright infringement, conflicts with other Circuit Courts; because the Tenth Circuit test rejected petitioner's legitimate "side-by-side" comparison, making the test incomplete and improper.

III. Seventh Amendment provides right to jury trial on all issues pertinent to awarded of statutory damages under Section 504(c) of Copyright Act, including the amount itself. FRCP 12(b)(6) is inapplicable and "moot," because the pro se petitioner was never notified of any specific defects in his Claims; and therefore had no opportunity to remedy his Complaint.

IV. 17 U.S.C. § 506(a)(c) and 18 U.S.C. § 2319. False Copyright Notice. Petitioner's indisputable proof of defendants' publication of false copyright notices (Fraudulently Certifying Prior Rights) are decisively relevant and inseparable from petitioner's specific claims for copyright infringement.

V. The copying of petitioner's purposely misspelled legal words, found only in petitioner's 1971 "CHIPPER" Manuscript, were identically misspelled; and published by the accessed defendants, later in time 1974 production, proving infringement. It was never the defendant's style of writing, to purposely misspell legal words for humor.

PARTIES

DENVER PUBLISHING COMPANY; E.W. SCRIPPS COMPANY; CHARLES SCHULZ CREATIVE ASSOCIATES; LEE MENDELSON, Producer; BILL MELENDEZ; BARR ARTHUR PRODUCTIONS INC.; WHOLESALE WAREHOUSING OF CANADA; CBS, INC.; NEWS AMERICA PUBLISHING INC.; KELLOGG COMPANY; METROPOLITAN LIFE INSURANCE COMPANY; CAPITAL CITIES/ABC, INC.; TCI OF COLORADO; GENERAL ELECTRIC COMPANY; TURNER BROADCASTING SYSTEM INC.; UNIVERSAL PRESS SYNDICATE INC.; SEARS ROEBUCK AND CO.; MONTGOMERY WARD & COMPANY; KACEY FINE FURNITURE; SOUNDTRACK; FINGERHUT CORPORATION; BEST BUY COMPANY; TYSON FOODS INC.; WALT DISNEY COMPANY; ADVANCE PUBLICATIONS INC.; S.I. HOLDINGS INC.; THOMSON CONSUMER ELECTRONICS; Respondents. KARTES VIDEO COMMUNICATIONS, A SCRIPPS HOWARD COMPANY, was dissolved to avoid liability, leaving Scripps Howard liable; and CYCLONE INC., skipped town to avoid petitioner's process server.

TABLE OF CONTENTS

Page

Reply To Questions Presented By Respondents i

Parties ii

Table Of Contents iii

Table Of Authorities ..... iv-vi

Statement Of The Case 1

Course Of Proceedings 4

Failure To Respond To Rule 56 Motions 5

Reasons For Granting The Writ 5

I. The Tenth Circuit Court Of Appeals Conflicts With The Seventh Circuit Court Of Appeals, Concerning Interpretations Of 17 U.S.C. § 507(b) 6

II. The Tenth Circuit Test For Copyright Infringement Was Incomplete And Only Partially Applied 6

III. Seventh Amendment To The Constitution Provides A Right To A Jury Trial; Dismissal Was Improper 8

IV. Respondent's False Copyright Notices Are Firmly Relevant 9

V. Respondents' Copying Of Petitioner's Purposely Misspelled Words, "BARATRY and REPLEVEN": Proves the "CHIPPER" Manuscript Was Right In The Accessed Respondents' Hands 9

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES:

Advertisers Exchange, Inc. v. Hinkley, 101 F.Supp. 801, 92 U.S.P.Q. 313, affd (CA8 Mo) 199 F.2d 313, 95 U.S.P.Q. 124, cert. den., 344 U.S. 921, 97 L. Ed. 710, 73 S. Ct. 388 (1951, Dc Mo) 3

Agair Inc. v. Shaeffer, 232 Cal.App.2d 513, 42 Cal.Rptr. 883 3

Brady v. Daly, (1897, CA2 NY) 83 F. 1007, aff'd 175 U.S. 148, 44 L. Ed. 109, 20 S. Ct. 62 3

Capital Elec. Co. v. Cristaldi, D.C.Md., 157 F.Supp. 646..... 5

Daves v. Lawyers Sur. Corp., Tex.Civ.App., 459 S.W.2d 655 3

Gilmore v. Anderson, (CC-NY) 38 F. 846.....2, 3

Gray v. Russell, (CC Mass) F. Cas No 5728 3

Grider v. Texas Oil & Gas Corp., 868 F.2d 1147 (10th Cir.), cert. denied, U.S.,.110 S.Ct. 76, 107 L.Ed.2d 43 (1989)..... 8

Harold Lloyd Corp v. Witwer, (Ca9 Cal) 65 F.2d I, cert. dismd, (U.S.) 78 L. Ed. 1507, 54 S. Ct. 94 2

Hughes v. Swinehart, D.C. Pa., 376 F.Supp. 650..... 5

Jaxon v. Circle K Corp., 773 F.2d 1138 (10th Cir. 1985)..... 8

King Features Syndicate v. Fleischer, 299 F. 533 (2d Cir. 1924) 2

Nichols v. Universal Pictures Corp., (CA2 NY) 45 F.2d 119, cert. den., 282 U.S. 902, 75 L. Ed. 795, 51 S. Ct. 216 2

TABLE OF AUTHORITIES – Continued

Page

Patten v. Superior Talking Pictures Inc., (DC-NY) 8 F.Supp. 196, 23 U.S.P.Q. 248 4

Reynoldson v. Shillinger, 907 F.2d 124 (10th Cir. 1990) 8

Swanson v. Bixler, 750 F.2d 810 (10th Cir. 1984) 8

Walt Disney Productions v. Air Pirates, (1972, DC Cal) 345 F.Supp. 108 2

Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979) 2

Warner Bros, Inc. v American Broadcasting Co., (CA2 NY) 720 F.2d 231, 222 U.S.P.Q. 101 2

CONSTITUTIONAL AND STATUTORY RULES PROVISIONS:

Amendments to the United States Constitution

First Amendment Rights 6

Seventh Amendment Rights 8

FEDERAL RULES OF CIVIL PROCEDURE:

FRCP 12(b)(6) 8, 10

FRCP 38 8

FRCP 56 5

UNITED STATES CODE:

17 U.S.C. § 504(c) 8

17 U.S.C. § 506(a)(c) and 18 U.S.C. § 2319 9

17 U.S.C. § 507(b) 6

TABLE OF AUTHORITIES – Continued

Page

DOCUMENT DEPOSITORIES/EXHIBITS:

"Manual For Complex Litigation Third"..... 4

"Document Depositories," Pretrial Procedures Pages 77 and 78..... 4

STATEMENT OF THE CASE

For many years, the "It's A Mystery, Charlie Brown" movie was removed from the national market; and a "moratorium" was applied by United Feature Syndicate on the movie; and the Random House and Disney books; because they were warned by Petitioner they were infringing his "CHIPPER" copyrights. Consequently, petitioner had to wait many years until "It's A Mystery, Charlie Brown" came back on the market to file suit in 1996.

Petitioner Fisher studied copyright law extensively, in law libraries; and even though he is a pro se litigant, he understands copyright law. In 1977 Fisher illustrated the nationally syndicated comic strip "BRENDA STARR"; so petitioner understands the syndicate business. Respondents and the lower courts erroneously claim, Fisher wrote and drew only ideas and never used expressions of ideas; and therefore has no copyright protection for his registered Comic Strips and Manuscript. This is absurd. All authors know it is impossible to write dialogue for characters interacting, without using expressions of ideas.

Mr. Flink improperly responds to Fisher's registered Sunday "LANGSYNE" comic strip. So why is Mr. Flink responding for another law firm? Because Universal Press Syndicate waived its rights.

United Feature Syndicate (UFS) owns all copyrights on "PEANUTS"; and they never had any other registered copyrights featuring a Cowardly Sherlock Snoopy; prior to the converted 1974 "It's A Mystery, Charlie Brown" Video feature; and not until after they accessed Fisher's 1971 Sherlock "CHIPPER" Manuscript and Comic Strips, in 1972 and 1973; for an unprecedented 9½ months (Two weeks normal return time).

United Feature Syndicate published a false 1958 copyright notice on a 1974 Snoopy/Sherlock Dog in the 1974 and 1975 TV Guide; to claim prior rights. This factor is extremely relevant.

Mr. Schulz, a contracted cartoonist employed by United Feature Syndicate (UFS) could have utilized his inherent hero Snoopy, as a heroic Sherlock Dog; and wrote a different story, but he did not. Schulz copied Fisher's cowardly protected characterization, plot, subject matter, theme, identical problem, story purpose, motivation, underlying foundation, moral of story, sequence of events; and misspelled words.

United Feature Syndicate's (UFS) 1993 "DRABBLE" Comic Strip is an infringing copy (Coverup) of (UFS) "It's A Mystery, Charlie Brown." Copying from infringing works is itself infringement. Previous infringement is not a defense; an infringement of an infringement, is an infringement. *Gilmore v. Anderson* (1889, CC NY) 38 F 846.

Cases:

> Two works may correspond in plot closely enough to constitute an infringement. *Nichols v. Universal Pictures Corp.* (CA2 NY) 45 F.2d 119, cert. den 282 U.S. 902, 75 L. Ed. 795, 51 S. Ct. 216. It has been recognized that a complete plot or sequence of events is protectable. *Harold Lloyd Corp. v. Witwer* (Ca 9 Cal) 65 F.2d I, cert. dismd (U.S.) 78 L. Ed. 1507, 54 S. Ct. 94. If a defendant copies substantial portions of a plaintiff's sequence of events, he does not escape infringement by adding original episodes somewhere along the line. *Warner Bros, Inc. v. American Broadcasting Co.* (CA2 NY) 720 F.2d 231, 222 U.S.P.Q. 101. Characters of cartoon strips and comic books and their graphic depiction are protected as component parts of copyrighted words. *Walt Disney Productions v. Air Pirates* (1972, DC Cal) 345 F.Supp. 108. An individual character featured in a comic strip is a separate copyrightable component of the comic strip. *Walt Disney Production v. Air Pirates,* 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979); *King Features Syndicate v. Fleischer,* 299 F. 533 (2d

Cir. 1924) Appropriation of but part of copyright constitutes infringement of whole of copyright. *Brady v. Daly* (1897, CA2 NY) 83 F. 1007, aff'd 175 U.S. 148, 44 L. Ed. 109, 20 S. Ct. 62. Infringement is not predicated upon quantity of material pirated. *Gray v. Russell* (CC Mass.) F. Cas. No. 5728. Rule of de minimis non curat lex does not apply, although defendant used only small amount of copyrighted material, since portion taken was important. *Advertisers Exchange, Inc. v. Hinkley* (1951, DC Mo) 101 F.Supp. 801, 92 U.S.P.Q. 313, aff'd (CA8 Mo) 199 F.2d 313, 95 U.S.P.Q. 124, cert. den. 344 U.S. 921, 97 L. Ed. 710, 73 S. Ct. 388.

Mr. Flink improperly responds to Tyson Foods who WAIVED their response; and he distorts the legal facts. Though an appropriator of another's work enclose such portions as he takes within quotations, he is not thereby relieved from liability for infringement. *Gilmore v. Anderson* (1889, CC-NY) 38 F. 846.

RCA (Thomson Consumer Electronics) has no trademark or copyrights on the name "CHIPPER"; and per the trademark office, Thomson Consumer Electronics abandoned their trademark attempts. "HIS MASTERS VOICE" is the only registered RCA trademark; and the RCA dog was never named anything, let alone "CHIPPER." All these "CHIPPER" names were immediately and oddly published, after UFS was aware Fisher was filing suit. This is "Constructive Fraud"); and it exists where conduct, though not actually fraudulent, has all actual consequences and all legal effects of actual fraud. *Agair Inc. v. Shaeffer*, 232 Cal.App.2d 513, 42 Cal.Rptr. 883, 886. Breach of legal or equitable duty which, irrespective of moral guilt, is declared by law to be fraudulent because of its tendency to deceive others or violate confidence. *Daves v. Lawyers Sur. Corp.*, Tex.Civ.App., 459 S.W.2d 655, 657. Publishing Fisher's "CHIPPER" name nationally, was designed to deceive the public in the 1990's, making it appear Fisher stole his own name "CHIPPER," and put

Fisher's "CHIPPER" creation in disrepute. Why didn't they use the name SNOOPY? A copyright does not cover the title to a story, but a name ("CHIPPER") which has become and is closely identified with the work of a particular author, cannot, during the life of the copyright, be used so as to mislead, either in another Book or motion picture. *Patten v. Superior Talking Pictures Inc.* (DC-NY) 8 F.Supp. 196, 23 U.S.P.Q. 248.

COURSE OF PROCEEDINGS

Mr. Flink's personal attacks are unprofessional and scandalous. His bias opinions have nothing to do with the petitioner's relevant five questions. Mr. Flink's remark of a 128 page, 300 paragraph, 43 Claim Complaint is a lie. Petitioner in good faith dismissed 31 claims, solely to simplify the case. Petitioner has 12 remaining Claims. Each claim is a subject of a separate suit and one claim does not affect another. The first six claims: 3, 12, 14, 18, 19 and 22, are all repeat infringements (All within the 3 year statute of limitations) of "It's A Mystery, Charlie Brown." The remaining six claims are separate entities; and that leaves only 7 causes of action to review. Petitioner used only three paragraphs per claim, that were explicit and legally presented; and never "unintelligible." Petitioner is confident the Supreme Court will find his Petition For A Writ Of Certiorari understandable; and hence will realize his Claims are also distinct.

Mr. Flink and the Magistrate Judge falsely claim petitioner's exhibits were not served on any of the respondents. Petitioner's process server, served duplicate boxes of exhibits to Baker & Hostetler on Feb. 25, 97; Page 14 (217) of District Court Docket; and per "Manual for Complex Litigation Third"; 21.444; "Document Depositories," Page 77 and 78. On March 26, 1997, only one month later Magistrate Judge Donald E. Abram (who petitioner recused on April 7, 1997; and who refused to recuse himself) granted all pending motions to quash service of process, for Petitioner's failure to serve exhibits. This is

Malicious abuse of legal process. Willfully misapplying court process to obtain object not intended by law. *Hughes v. Swinehart*, D.C. Pa., 376 F.Supp. 650, 652. *Capital Elec. Co. v. Cristaldi*, D.C. Md., 157 F.Supp. 646, 648.

FAILURE TO RESPOND TO RULE 56 MOTIONS

FRCP 56; Motions for Summary Judgement, were totally ignored by respondents. They refused to answer in violation of the Rule 56 clear mandate. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." The District Court erred by not granting plaintiff his Summary Judgments. Per the Docket; no specific facts were filed by the defendants, to plaintiff's lawful Rule 56 Motions for Summary Judgment, other than mere allegations in opposition.

REASONS FOR GRANTING THE WRIT

The chicanery that has occurred in this case is unbelievable. Why did the Judges follow the recommendations of a recused Magistrate? There was no discovery, no deposition was ever taken of the petitioner by any counsel; there were no evidentiary hearings, no pre-trial hearing, no order by the court to remedy petitioner's complaint, because of unintelligibility; because in fact, it was perceptively understandable. There were total lies regarding exhibits not being served to defendants; and no legitimate replies were filed by respondents to motions filed by petitioner for Rule 56 summary judgements. Petitioner's Motion for borrowing the record on appeal, was rejected from the Appeals Court; after Mr. Flink borrowed it; a barred procedure; and Petitioner was also

rejected an Oral Argument, in violation of Fisher's (Freedom of Speech) First Amendment Rights.

I. THE TENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE SEVENTH CIRCUIT COURT OF APPEALS CONCERNING INTERPRETATIONS OF 17 U.S.C. § 507(b).

The opinion of the Tenth Circuit conflicts with the Seventh Circuit Court of Appeals, 17 U.S.C. § 507(b); (The "last discovered infringing act" and a "continuing wrong"); adopted by the Seventh Circuit; concerning accessed Universal Press Syndicate's 1993 Sunday comic strip "For Better or For Worse" vs. Petitioner's registered 1975 Sunday "Langsyne" comic strip. Respondent's WAIVED their rights.

II. THE TENTH CIRCUIT TEST FOR COPYRIGHT INFRINGEMENT WAS INCOMPLETE AND IMPROPERLY APPLIED.

The Tenth Circuit Court wrongly concluded that petitioner relied exclusively on a cowardly Sherlock dog similarity. This is completely untrue; because if this were true, no precise "side-by-side" comparison of a 2,900 word "CHIPPER" Manuscript, with 527 substantial and striking similarities; plus copying of errors, would be in evidence.

See PETITIONER'S WRIT OF CERTIORARI, pages 11 and 12 covering many cases using a "side-by-side" comparison.

Mr. Flink's deceptive claim that Snoopy, created in 1950 entitles United Feature Syndicate to all rights since 1950, is a lie; and totally irrelevant. Every "Peanuts" comic strip or movie, is a separate registration, on the date it is received in the copyright office. There is no blanket copyright.

Mr. Flink and all other respondents, have retained all of Fisher's Exhibits, since February 25, 1997; and therefore Mr. Flink already knows the years 1962 and 1958 are fraudulent; and irrelevant. The 1962 drawing is legally nonexistent, as copyright letters prove. There is no separate registration for Snoopy as a Sherlock Dog in 1962 or 1958. That is exactly why Fisher brought the fraudulent 1962 and 1958 drawings into evidence, because he retains letters from the copyright office proving fraud; and because no separate registrations exist.

Mr. Flink continues distorting facts. Fact; Heroic Snoopy was portrayed as a Cowardly Humanized Sherlock Dog in the 1974 animated cartoon feature, "It's A Mystery, Charlie Brown." Snoopy was always portrayed as a Heroic humanized cartoon dog in the "Peanuts" comic strip. Quote Schulz: "Snoopy is a HERO!" Snoopy was never a Coward.

Fisher's registered "CHIPPER" Manuscript and Comic Strips involve an inherent cowardly cartoon Sherlock Dog; and this original "CHIPPER" feature, has no connection with a realistic version of any Sherlock Holmes books or movies.

"Defendants have been using the old 'scenes a faire' and 'public domain' device for decades; and Defendants always attempt to avoid the copyright by the 'old argument'; that various attributes of 'Sherlock Holmes' find prototypes or analogues among the heroes of literature and mythology." See petitioners Writ of Certiorari; pages 11 and 12. These cases publish resolutely analogous "side-by-side" comparisons.

All "CHIPPER" registrations are valid; and not in the public domain. Original episodes of petitioner's "CHIPPER" feature do not fall under any "scenes a faire doctrine"; and petitioner's copyrights are protected under the old law (1909) covering "all writings" of author; and the 1976 law "original with the author."

III. SEVENTH AMENDMENT TO THE CONSTITUTION PROVIDES A RIGHT TO A JURY TRIAL; DISMISSAL WAS IMPROPER.

FRCP Rule 38; Jury Trial of Right, shall be preserved to the parties inviolate.
Seventh Amendment provides right to jury trial on all issues pertinent to award of statutory damages under Section 504(c) of Copyright Act, including the amount itself.

THE LOWER COURTS' ALLEGATION OF FRCP 12(b)(6) INFRACTION IS MOOT.

The Lower Courts FRCP 12(b)(6) dismissal was improper and the respondents FRCP 12(b)(6); failure to state a claim for relief, is terminated. The petitioner's Claims enclosed well pleaded factual contentions. However, even if this factor was not the case, "pro se litigants are to be given reasonable opportunity to remedy the defects in their pleadings." See; *Reynoldson v. Shillinger,* 907 F.2d 124, 126 (10th Cir. 1990); *Jaxon v. Circle K Corp.,* 773 F.2d 1138, 1140 (10th Cir. 1985).

The Tenth Circuit did not adhere to their own rules; and never cited petitioner of specific defects in his Complaint. Therefore, the petitioner was never given an opportunity to remedy defects if there were any. The Tenth Circuits vague allegation of meritless and unintelligible claims is unethical and without foundation; and because of this factor, pro se litigant's pleadings were never construed liberally or held to a less stringent standard than formal pleadings drafted by lawyers.

"We must accept all the factual allegations as true and must draw all reasonable inferences in favor of the plaintiff." (This was never done). *Swanson v. Bixler,* 750 F.2d 810, 813 (10th Cir. 1984). "A case should not be dismissed for failure to state a claim unless the court determines beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Grider v. Texas Oil & Gas Corp.,* 868 F.2d 1147, 1148 (10th Cir.), cert. denied, U.S., 110 S.Ct. 76, 107 L.Ed.2d 43 (1989).

IV. RESPONDENT'S FALSE COPYRIGHT NOTICES ARE FIRMLY RELEVANT.

Civil 17 U.S.C. § 506(a)(c) and Criminal 18 U.S.C. § 2319.

Petitioner's indisputable proof of defendants' publication of false copyright notices, relates directly to fraudulent intent (Fraudulently Certifying Prior Rights); and are decisively relevant and inseparable from petitioner's specific claims for copyright infringement. Mr. Flink's ludicrous claim that the Tenth Circuit has no jurisdiction over petitioner's proof of false copyright notices is unethical. Petitioner's Complaint noted false copyright notices; and The Tenth Circuit Court should have taken decisive action, knowing respondent's broke the law. The civil and criminal aspects of this case overlap each other and therefore are applicable.

V. RESPONDENTS' COPYING OF PETITIONER'S PURPOSELY MISSPELLED WORDS, "BARATRY AND REPLEVEN"; PROVES THE "CHIPPER" MANUSCRIPT WAS RIGHT IN THE ACCESSED RESPONDENTS' HANDS.

Copying petitioner's purposely misspelled words proves infringement; because defendant never purposely misspelled legal words. Mr. Flink's habitual deceptions and distortions are disgusting. The facts claimed by United Feature Syndicate are: "Charles Schulz, never purposely misspelled words in the "Peanuts" comic strip." Schulz never used misspelled words to be funny; that is Fisher's writing style; and Fisher used it extensively in his "CHIPPER" feature. There is a world of difference between typographical errors; and purposely misspelled legal words to catch a plagiarist.

Schulz never used purposely misspelled words in the "Peanuts" strip. Source and proof: Hard-bound book entitled: GOOD GRIEF, The Story of Charles M. Schulz, Text Copyright 1989 by Rheta Grimsley Johnson Pharos Books, A Scripps Howard Company 200 Park Avenue,

New York, NY 10166. See Page 29; Quote: James L. Freeman, Managing Editor of United Feature Syndicate: "He (Schulz) misspelled weird once or twice early on, but I can't think of any other grammar or spelling infraction"; and Page 65; Quote: "He also is adamant about spelling and factual accuracy. If a strip makes a musical reference, Schulz has done his homework, copying exact scores for authenticity. Same goes for medicine, law, sports or religion." How true! How true!

Schulz copied Fisher's purposely misspelled words "BARATRY" and "REPLEVEN" exactly; because he didn't do his homework; and if he had, he would have correctly spelled the words; "BARRATRY" and "REPLEVIN." Conclusively, Schulz copied petitioner's errors and this is prima facie evidence of infringement. For stare decisis case law, on copying of errors, see page 15 of "Petition For A Writ Of Certiorari."

CONCLUSION

Mr. Flink's deceptive allegations, are obvious scare tactics to discourage the Supreme Court from giving petitioner a legitimate review. Mr. Flink's biggest fear is an unbias review of a "side-by-side" comparison of "CHIPPER" vs "IT'S A MYSTERY, CHARLIE BROWN," that would lead to a reversal; and a legitimate jury trial. Also, the amount of damages petitioner sought were proven itemized profits using the respondent's own figures. It is important to realize, the income from the "PEANUTS" comic strip empire, exceeds $176 Million dollars a year.

Pro se Fisher's remaining claims were illegally and improperly dismissed pursuant to FRCP 12(b)(6); because he was never given the opportunity to remedy any deficiencies. Petitioner Fisher's writ of certiorari should be granted, because without an ethical review and reversal, the nations syndicates will continue to enjoy a permanent license to infringe.

Respectfully submitted,
PHILIP CONDON FISHER
APS, IPA, IBA, ABI